Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT D. SPRAGUE, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Retirees of General Motors Corporation made claims under an ERISA plan for vested lifetime health care benefits at GM's expense. Early retirees also claimed that GM entered into separate bilateral early retirement agreements for free lifetime health care. All summary plan descriptions ("SPDs") contained explicit promises of lifetime health care at no cost to retirees. Some SPDs also contained a general reservation of GM's right to change the plan. The questions presented are:

1. Do express promises of lifetime health care in ERISA SPDs vest benefits at retirement?
2. Are bilateral contracts for lifetime health care enforceable under ERISA?
3. Did the court of appeals misapply Fed. R. Civ. P. 23 as to the early retirees, effectively closing the courts to class actions for ERISA benefits?

PARTIES

Petitioners are salaried retirees of respondent General Motors Corporation ("GM"), or surviving spouses of salaried retirees, who retired or agreed to retire prior to March 1988, when the first of the changes challenged in this case became effective. The 113 named plaintiffs in the action below, petitioners here, are: Robert D. Sprague, Leonard P. Moeller, M. Scott Pruyn, Robert J. Unkrich, Kenneth H. Adair, Donald D. Agostino, Oren R. Alger, Marvin S. Allen, Jack M. Amie, Alfred A. Anderson, Austin B. Anthony, Benjamin J. Aponik, Owen Ard, Joseph R. Aron, Edwin C. Ault, Jr., Omer Bailey, Clare W. Baird, Lewis E. Ballard, Elizabeth R. Baly, Robert J. Benson, Richard J. Berube, Robert H. Bickmeyer, Floyd C. Biggs, Walter H. Boemker, Anthony S. Boldizar, Russell B. Boone, Harold J. Bourcier, Victor J. Briscoe, Raymond H. Brownlie, James T. Bruce, Donald H. Buggia, Clinton W. Burns, James R. Cagle, Curtis T. Carlson, Robert B. Chinnock, Samuel A. Clapp, Jearild S. Colman, Jr., William J. Conley, Murlyn D. Conover, Ronald L. Conrow, Ellis W. Cook, Jr., Gordon P. Coulman, Richard G. Coursen, Breese E. Dame, Norman O. Davis, Arthur C. DeMaria, Geraldine Dombrowski, Francis B. Doonan, Kenneth E. Engle, Otto D. Ethridge, Shirley Faroh, Mae L. Fellows, John D. Fittro, Gerald M. Flynn, Mary G. Franklin, Roy C. Freeman, Melvin E. Frey, John C. Funk, Carl A. Gabrielson, John F. Gerald, Howard F. Gillard, Joseph A. Gillen, Jr., John B. Gingell, Robert L. Goodwin, Earl T. Gordon, Carl W. Greenman, Carl G. Groaning, Paul J. Groseclos, Olan G. Hafley, William C. Harkins, Florence Harner, Chris L. Hawkins, Richard C. Hayes, Bernard H. Hendricks, Prudie Holbrook, Leita M. Holdaway, Ernest R. Hoyt, Walter F. Huppenbauer, Harold L. Knicely, Henry E. Knight, Thomas A. Kolander, Leonard J. Komasara, Edwin T. Konieczny, Walter Lampert, Christoph J. Lorenz, Francis M. Lumley, Jerry McConnell, Edward Mendes, Loren D. Meyer, Hal C. Meyers, Wilfred B. Negrete, Donald W. Nesbit, Henry E.

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PETITION FOR WRIT OF CERTIORARI

This case presents sharp legal issues of recurring national importance concerning the vesting of ERISA welfare benefits in retirement. The courts of appeals are in conflict concerning which ERISA plan documents govern the vesting of benefits, the language needed to vest benefits, and the enforceability of individual ERISA benefit agreements.

This case illustrates why the conflicts in the courts will not abate without resolution by this Court. Over two decades GM induced tens of thousands of salaried employees into early retirement. GM contracted in writing with these retirees for lifetime health care at GM's expense and other benefits in exchange for their early departure. Later, GM shifted health care costs to retirees and surviving spouses, claiming the contracts were unenforceable under ERISA. The same cycle—corporate

downsizing, inducements to retire, and post-retirement changes to rescind benefit promises—continues nationwide. Along with it, the lower courts continue to struggle to reconcile ERISA's technical rules with ERISA's mandate to protect contractually defined benefits.

Unlike the Sixth Circuit here, other courts of appeals have been frank to acknowledge the split in the circuits on the difficult issue of ERISA welfare benefit vesting. The courts are split on whether the presence of both a lifetime promise and a general reservation of the right to amend in the same summary plan description ("SPD") is an ambiguity on the vesting question; whether a lifetime promise in an SPD governs a general reservation in the underlying plan; and whether benefits may vest only if ERISA plans or SPDs are unambiguous in favor of the employees.

Factual variations among ERISA welfare plans are myriad, yet the core legal conflicts are pervasive and persistent. This case presents the vehicle to resolve these conflicts and provide definitive guidance to millions of plan participants and administrators alike.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, entered January 7, 1998, 133 F.3d 388, is reprinted in the Appendix at 1a. The following orders and opinions are also reprinted in the Appendix: August 14, 1996, 92 F.3d 1425 (6th Cir.) (panel decision) (vacated) (A. 54a); August 4, 1994, Final Judgment (E.D. Mich.) (A. 89a); July 18, 1994, 857 F. Supp. 1182 (E.D. Mich) ("*Sprague III*") (decision in favor of early retirees on estoppel; summary judgment for GM on claims of general retirees; grant of partial injunctive relief to early retirees) (A. 92a); February 2, 1994, 843 F. Supp. 266 (E.D. Mich.) ("*Sprague II*") (findings and conclusions after trial on ERISA contract claims of two principal subclasses of early retirees; denial of GM motion to decertify class) (A. 114a); April 9, 1992, Order

Amending Class Certification (E.D. Mich.) (A. 220a); November 4, 1991, Order on Class Certification (E.D. Mich.) (A. 221a); July 29, 1991, 768 F. Supp. 605 (E.D. Mich.) ("*Sprague I*") (partial summary judgment for GM on general plan vesting issues and denial of GM's motion with regard to bilateral contract claims of early retirees) (A. 224a); November 7, 1996, 102 F.3d 204 (6th Cir.) (grant of rehearing) (A. 238a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit *en banc* was entered on January 7, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, are set forth in the Appendix. Included are relevant portions of the following: Section 3, 29 U.S.C. § 1002, Definitions ("employee welfare benefit plan" and "employee benefit plan") (A. 240a); Section 102, 29 U.S.C. § 1022, Plan Description and Summary Plan Description (A. 240a-241a); Section 402, 29 U.S.C. § 1102, Establishment of Plan (A. 242a); and Section 502, 29 U.S.C. § 1132, Civil Enforcement (A. 242a-243a).

STATEMENT OF THE CASE

1. Statement of Facts.

a. *The GM Salaried Health Care Program.*

From the mid-1960s GM provided health care benefits to salaried retirees and surviving spouses. GM assumed the full cost of the basic hospital and medical expense coverage (A. 125a). No deductibles or copayments were required for the basic coverages (A. 217a). Prescription drug, vision, dental, and hearing aid coverages were added later, for which individual copayments were required (A. 126a).

In 1988 GM implemented major changes in its salaried health care program, affecting approximately 84,000 salaried retirees and surviving spouses (A. 217a). Salaried retirees were required to pay program-wide deductibles and copayments for basic coverages (A. 127a), thereby losing "first dollar coverage" (A. 217a-218a). Vison, hearing aid, and other coverages were also eliminated (A. 127a-128a). Individual copayments continued to be charged separately even after the major changes in deductibles and copayments were imposed (A. 218a). GM made additional changes during the lawsuit, and retirees now pay up to $5,000 annually for out-of-pocket expenses (A. 216a n.22; Tr. Exs. 65, 66, R433).

b. *Early Retirement Programs.*

From 1974 to 1987 GM downsized its workforce, using various incentive programs to encourage early retirement by salaried employees otherwise ineligible for full retirement benefits (A. 115a). Some of the early retirement programs were corporatewide, and others applied to particular divisions or plants (*id.*).

Early retirement under the programs required a written agreement between GM and the salaried employee (A. 129a-136a). Employees signed "Statements of Acceptance" of early retirement indicating that they reviewed and accepted benefits under the program (A. 184a-186a). By executing the agreements, the early retirees gave up future employment with GM and waived rights to state claims against GM (A. 186a).

In connection with the agreements, early retirees received written benefit explanations summarized in detail in the decision in *Sprague II* (A. 136a-180a, 203a-219a). Approximately five dozen forms were used over the fourteen-year period (A. 136a-137a). Some were lengthy (*e.g.*, Tr. Ex. 733, R433, 47 pages); others were briefer (*e.g.*, A. 138a-142a, 161a-162a (Morris memorandum, 3 pages; Saginaw Steering Gear, 1 page)). All benefit

explanations were authorized communications of GM (A. 214a-215a).

c. ***SPDs and Other General Booklets.***

Between the passage of ERISA and the time of the challenged changes, GM issued seven plan summaries that, the district court found, served as ERISA summary plan descriptions ("SPDs") (A. 180a-183a). Summaries dated 1974, 1977, 1980, and 1985 for active employees were entitled "Your GM Benefits." Summaries dated 1977, 1980, and 1985 for retired employees were entitled "Your Benefits in Retirement" (*id.*).

Each of the seven SPDs contained one or more statements that: "Your basic health care coverages will be provided at GM's expense for your lifetime. . ." (A. 229a).

The 1974, 1977 and 1980 "Your GM Benefits" summaries contained no language reserving GM's right to change or terminate the plan (A. 39a-40a) (Martin, C.J., dissenting). The 1985 "Your GM Benefits" and "Your Benefits in Retirement" summaries stated that GM "reserves the right to amend, change or terminate the Plans and Programs described in this booklet" (A. 234a). The 1977 and 1980 "Your Benefits in Retirement" summaries contained no reservation of rights language but stated that benefits were "subject to change." *Id.*; see A. 194a ("changes were always communicated to employees as positive improvements").

Before the passage of ERISA GM put out booklets dated 1965, 1966, 1968, and 1971 (A. 180a-181a). Each contained one or more statements that GM would pay the full cost of basic health care coverages for the lifetime of the retiree and surviving spouse. Three of the four also contained general reservation of rights language (*id.*).

In sum, from 1965 through 1985 each booklet or SPD contained explicit provisions for lifetime health care

at GM's expense. Between 1971 and 1985 no general reservation of rights language appeared in any summary.

d. *Insurance Documents and the 1985 "Draft" Plan.*

Before 1985 GM operated the salaried health care program under insurance arrangements. There was no separate document designated as the ERISA plan. The district court found that the various contracts and certificates of insurance were underlying plan documents (A. 233a). In concluding that GM unambiguously had reserved the right to change the plan in underlying plan documents, however, neither the district court nor the court of appeals referred to any reservation of rights language in insurance documents. A. 236a & n.8 (referring instead to language in SPDs); *see* A. 3a-4a n.2, A. 17a-18a (affirming district court). The insurance contracts and certificates did not contain reservation of rights language (Tr. Exs. 509-524, 526-534, 536, R433, R435).

In 1985 GM became self-insured. The Sixth Circuit *en banc* majority accepted the district court's finding that a 1985 draft program statement was an underlying plan document for this period (A. 3a; *see* A. 227a). The document stated that GM could change enrollee rates of payment or any other program terms and conditions (A. 19a n.10).

The 1985 document had a typewritten cover sheet marked "draft" with the title "The General Motors Health Care Insurance Program for Salaried Employees" (Tr. Ex. 451, R433, R435). The document itself applied only to "hourly" employees, however, and in reality was the text of a GM-UAW health care collective bargaining agreement for hourly employees (*id.* at 759-60; R69, Exs. 19, 20). GM did not distribute it to salaried employees or inform them of its existence (11/2/89 Hall Dep. at 256, R1).

2. District Court Proceedings.

Petitioners filed this case in 1989 as a class action under ERISA. The complaint included the following claims: GM failed to maintain its salaried health care plan in a "written instrument" as required by 29 U.S.C. § 1102 (Count I); the challenged changes violated the terms of the health care plan, including SPDs which promised free lifetime health care coverage without any reservation of rights language (Count II); GM contracted with early salaried retirees for lifetime health care at GM's expense (Counts II and IV); GM was estopped from denying such coverage to all salaried retirees (Count V); and GM breached its fiduciary duty to retirees (Count III). The district court had jurisdiction over all the claims in the action under 29 U.S.C. § 1132(e) and, with respect to the ERISA contract claims based on federal common law, under 28 U.S.C. §§ 1331 and 1337 as well.

Early in the case the district court in *Sprague I* granted GM's motion for partial summary judgment as to the general plan issues, deciding that GM unambiguously had reserved the right to modify the salaried health care plan during petitioners' retirement (A. 224a). The district court's ruling relied on reservation of rights language and "subject to change" language found in some SPDs (A. 229a-230a, 233a-236a). The court also granted GM's motion to dismiss the claims for breach of fiduciary duty (A. 237a).

At the same time, the district court allowed the claims of early salaried retirees to proceed, stating that GM might have "bilaterally contracted to provide vested benefits to early retirees," and that these "early retirement agreements may be enforceable under ERISA as independent bilateral contracts or as modifications of GM's health care benefit plan" (A. 236a).

The court then certified the class of approximately 50,000 early retirees (A. 221a-223a; *see* A. 117a-118a).

At GM's request, the court narrowed the class certification to one under Fed. R. Civ. P. 23(b)(2) (A. 220a). No action was ever taken on the class action motion as it related to those retirees falling outside the class of early retirees, a group of approximately 34,000 individuals referred to in the litigation as "general retirees" (A. 116a).

In 1993, the court conducted a bench trial on the ERISA contract claims of subclasses 1 and 2, the two principal subclasses of early retirees. Members of those subclasses had signed long form or short form "Statements of Acceptance" of early retirement indicating their agreement with the benefits package and, in most cases, providing a general release in favor of GM against claims of age discrimination and other claims.[1]

In *Sprague II*, the district court found that the "members of the plaintiff class were offered a special deal, the terms of which go beyond the general retirement plan" (A. 189a). The court found that "virtually all of the benefit explanations provided to the early retirees by GM contain statements regarding both the duration of health care benefits ('for life,' 'during retirement,' 'continued after retirement,' 'lifetime,' 'will be continued,' 'for the rest of your lives'); and the cost of the benefits ('no cost to retiree,' 'paid up,' 'at corporation expense,' 'without cost,' 'free,' 'GM pays full costs,' 'corporation paid basis,' 'at GM's expense,' 'paid for life by General Motors,' 'fully paid by GM')" (A. 215a). The court held that "GM entered into contracts with its early retirees which vested in the retirees and their spouses certain health care benefits for their lifetimes at no cost to them. . . . These early retirement agreements are enforceable under ERISA as independent bilateral contracts, or as modifications of GM's health care benefit plan" (A. 183a).

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[1] Subclass 3 members signed a "Statement of Intent to Retire." Approximately 5,000 early retirees made up this subclass. They did not have bilateral contract claims. The district court in *Sprague III* resolved their estoppel claims in their favor on the basis of the trial record, however (*see* A. 110a).

The district court also declined to decertify the class. In referring to the sample of class members used for the trial, the court stated (A. 124a):

> As a group, the 318 individuals are representative of their respective subclasses and the class as a whole from the standpoint of the typicality and commonality of their claims, and from the standpoint of GM's action on grounds generally applicable to the class. Those who testified are representative of the class in terms of facilities in which they worked, time-frame, and types of early retirement. Moreover, plaintiff class does not rely exclusively on the testimony of their witnesses. Much of the documentary evidence comes from the personnel files of randomly selected retirees, as well as other sources. Finally, GM failed to produce any significant rebuttal evidence to demonstrate that the treatment of plaintiffs' witnesses was atypical.

In *Sprague III*, the court found in favor of the early retirees on their estoppel claims, and granted GM's summary judgment motion regarding general retirees (A. 102a-110a). The court also granted a limited injunction during appeal to avoid hardships (A. 112a-113a).

3. Sixth Circuit Proceedings.

The parties cross-appealed. On August 14, 1996, a panel of the Sixth Circuit unanimously upheld the judgment in favor of the early retirees, upheld the class action, reversed the dismissal of fiduciary duty claims, and remanded the claims of the general retirees (A. 54a).

The Sixth Circuit granted GM's motion to rehear the case *en banc* and vacated the panel decision (A. 238a). The *en banc* court issued its opinion on January 7, 1998 (A. 1a). Eight judges ruled against the retirees on all claims. Five judges dissented in whole or in part.

First, the court decided that the district court abused its discretion in certifying the class of early retirees, holding that their issues were "anything but common" (A.

13a). The court also ruled that the class of early retirees failed the typicality test because a "named plaintiff who proved his own claim would not necessarily have proved anybody else's claim" (A. 16a).

Second, the court ruled against petitioners on the general plan issues. The court affirmed the summary judgment ruling in *Sprague I* that GM unambiguously had reserved the right to amend or terminate its plan (A. 17a-23a). The court held that where an SPD contains both a promise of lifetime benefits and a statement reserving the right to change the plan, it is unambiguous and the reservation controls as a matter of law (A. 20a). With regard to those SPDs containing a clear statement that benefits are for life at no cost to the retirees, without any stated reservation of right to change the plan, the court held that benefits still do not vest in these circumstances. The court viewed the absence of any reservation language as "silence" on the vesting question (A. 21a), and stated that "GM was not required to disclose in the summary plan descriptions that the plaintiffs' benefits were not vested" (A. 22a).

Third, the court of appeals reversed the judgment in favor of the early retirees by holding that the bilateral early retirement agreements for lifetime health care are not separately enforceable under ERISA, apart from the terms of the general health care plan (A. 23a-25a). The court determined that an agreement for benefits must satisfy all or most of ERISA's "written instrument" requirements in 29 U.S.C. § 1102 before it can be enforced under ERISA (A. 25a). The court so ruled as a matter of law only, inasmuch as GM did not appeal the factual findings in *Sprague II* as clearly erroneous.

Fourth, the court rejected the petitioners' claims based on estoppel and breach of fiduciary duty (A. 25a-31a), concluding that GM gave out "no inaccurate information" (A. 31a).

Chief Judge Martin, joined by Judges Moore and Cole, authored the principal dissenting opinion, calling for "a finer caliber of analysis" than provided in the *en banc* opinion (A. 38a). Judges Lively and Merritt issued separate partial dissents (A. 33a, 37a).

Judge Martin synopsized the SPDs, stating that "from 1974 to 1985 General Motors distributed employee booklets that promised free lifetime health care and contained no reservation of rights" (A. 40a). He and his colleagues dissented from the majority's view that the presence of "lifetime"/"no cost" language in SPDs meant they were "silent" on the vesting question and stated: "Noting that benefits are 'for your lifetime' is tantamount to saying that General Motors cannot change the plan. . . . [L]ifetime rights are vested rights" (A. 45a).

The Chief Judge wrote that the judgment in favor of early retirees should be upheld and that the "contracts are best enforced under federal common law" (A. 48a). He recounted that the extrinsic evidence of the partially integrated early retirement agreements "includes written materials showing that General Motors personnel used almost virtually every possible permutation of the words 'free lifetime health care' when presenting future benefits to employees." *Id.; see also* A. 34a-35a (Lively, J.).

Judge Martin also found error in the failure to uphold class certification, stating that the district court did not abuse its discretion "when it certified a class in which all the members were seeking exactly the same remedy and doing so under the same legal theories." A. 50a-51a; *see* A. 33a-34a (Lively, J.).

As to the estoppel claims, Judge Martin and his colleagues would have upheld the judgment in favor of early retirees, and would have allowed the general retirees' claims to go forward (A. 48a-50a). Similarly, with respect to the claims for breach of fiduciary duty, the dissent disagreed with the *en banc* majority's view that GM's rep-

resentations concerning lifetime health care were not misleading (A. 52a). Judge Lively added: "It was misleading to tell these employees they would have company-provided health care throughout their lives while at the same time failing to advise them that it was claiming to reserve the right to withdraw the benefit after the employees accepted early retirement" (A. 35a-36a).

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE IN CONFLICT OVER WHETHER EXPRESS PROMISES OF LIFETIME HEALTH CARE IN ERISA SUMMARY PLAN DESCRIPTIONS VEST BENEFITS AT RETIREMENT

This Court should grant the petition to resolve the conflicts in the circuits concerning vesting of welfare benefits under ERISA SPDs which contain promises of lifetime health care. Unlike the Sixth Circuit here, other courts of appeals explicitly have recognized the seriousness of these conflicts. *See, e.g., Barker v. Ceridian Corp.*, 122 F.3d 628, 635 (8th Cir. 1997) ("difficult contract interpretation questions"; courts "have not answered this puzzling question uniformly"); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511-12 (10th Cir. 1996) (noting conflicts over these "difficult issues of interpretation"); *see also Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307 (7th Cir. 1996) (approach of other circuits termed "interpretive gymnastics").

Here every SPD expressly provided for lifetime health care benefits at no cost to retirees. The Sixth Circuit held that this language neither vests benefits "[n]or even implies that the plaintiffs' benefits were vested" (A. 22a-23a). The decision illustrates the conflicts in the circuits on virtually every aspect of the rules for vesting of ERISA welfare benefits under SPDs.

First, the Sixth Circuit's holding that the presence of both lifetime and reservation of rights language in the

same SPD renders the plan unambiguous against vesting (A. 20a) is squarely in conflict with decisions of other circuits. The Seventh, Eighth, and Eleventh Circuits hold that the presence of both types of statements gives rise to an ambiguity to be resolved by resort to extrinsic evidence. *Barker,* 122 F.3d at 635 (8th Cir.); *Diehl,* 102 F.3d at 306 (7th Cir.); *Stewart v. KHD Deutz of America, Corp.,* 980 F.2d 698, 703-04 (11th Cir. 1993). Even in some cases where courts have declined to find vested benefits in the presence of both types of statements, they have not gone as far as the court below to deny vesting in all such circumstances; rather, the Third and Tenth Circuits might allow vesting in the presence of both types of statements depending on the facts of a particular case. *Chiles,* 95 F.3d at 1512 (10th Cir.) (declining to adopt "hard-and-fast rule"); *In Re Unisys Corp. Retiree Med. Benefit ERISA Litig.,* 58 F.3d 896, 904 n.11 (3d Cir. 1995) ("We do not hold that a reservation of rights will always prevail over a promise of benefits").

Second, the Sixth Circuit decided that an express promise of lifetime benefits in the SPD, unaccompanied by any statement of reservation of right to change the plan, "does not trump the clearly-stated right to do so in the plan itself" (A. 21a). Prior to the decision below, the Sixth Circuit itself subscribed strongly to the principle that "statements in a summary plan [description] are binding and if such statements conflict with those in the plan itself, the summary shall govern." *Edwards v. State Farm Mut. Auto. Ins. Co.,* 851 F.2d 134, 136 (6th Cir. 1988). Underlying this principle is the primacy given the SPD in ERISA as the means of communicating benefits to employees, and the unfairness that would result from allowing employers to disclaim the binding nature of the SPD. *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 982 (5th Cir. 1991).

Now, by deciding that reservations in underlying plan documents "trump" SPDs containing lifetime promises

with no reservations, the Sixth Circuit has placed itself in conflict with the overwhelming majority of circuits that have adopted the principle that SPDs are binding and govern in the event of a conflict with the underlying plan. *Williams v. Midwest Operating Engr's Welfare Fund*, 125 F.3d 1138, 1140-41 (7th Cir. 1997); *Barker*, 122 F.3d at 633 (8th Cir.); *Chiles*, 95 F.3d at 1518-19 (10th Cir.); *Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 140 (4th Cir. 1993); *Hansen*, 940 F.2d at 981-82 (5th Cir.); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990); *Fuller v. CBT Corp.*, 905 F.2d 1055, 1060 (7th Cir. 1990); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570-71 (11th Cir. 1985).[2]

Third, the court of appeals held that the intent to vest "must be found in the plan documents and must be stated in clear and express language" (A. 19a), *quoting Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993); *see Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994) (same), *cert. denied*, 514 U.S. 1057 (1995). The rule that vesting can never occur if the plan is ambiguous has been rejected explicitly by the Second and Seventh Circuits. *Schonholz v. Long Island Jewish Med. Ctr.*, 87

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[2] In this case the Sixth Circuit's "trump" rule doubly harmed petitioners, particularly those approximately 45,000 early and general retirees who retired under SPDs (1974, 1977 and 1980 "Your GM Benefits") with no reservation of rights language of any kind. Not only did they lose the advantage of the "SPD governs" principle, they suffered from the Sixth Circuit's erroneous assumption that the underlying plan clearly reserved to GM the right to change the plan. For the period prior to 1985, the insurance policies and certificates contained no such reservation. For the period 1985 onward, the Court relied on the "draft" plan whose terms applied only to hourly employees and retirees, not salaried personnel. The *en banc* majority ignored petitioners' appeal that GM had no underlying plan or plan amendment procedures in compliance with ERISA's "written instrument" requirements, despite the fact that these issues were amply briefed and were treated in the Sixth Circuit panel decision (A. 78a).

F.3d 72, 78 (2d Cir.), *cert. denied,* 117 S. Ct. 511 (1996) ("employer's intent need not be stated unambiguously"); *Bidlack v. Wheelabrator Corp.,* 993 F.2d 603, 607 (7th Cir.) (*en banc*), *cert. denied,* 510 U.S. 909 (1993) (rejecting position that contract "must state unequivocally" that benefits are vested). It has also been rejected implicitly in numerous decisions recognizing that, in the event of plan ambiguities, vesting can be determined by resort to extrinsic evidence in accordance with basic contract principles.[3] In contrast to the position of the Sixth Circuit, other courts of appeals recognize that the words "lifetime" and "no cost," or similar phraseology, can lead to a determination of vested benefits. *See Diehl,* 102 F.3d at 306-08 (7th Cir.); *Jensen v. SIPCO, Inc.,* 38 F.3d 945, 950-52 (8th Cir. 1994), *cert. denied,* 514 U.S. 1050 (1995); *Stewart,* 980 F.2d at 703-04 (11th Cir.).

The Sixth Circuit's departure from the rules for vesting under SPDs adopted by other courts of appeals affects more than contractual vesting claims under ERISA § 502(a), 29 U.S.C. § 1132(a). Here petitioners also brought claims based on estoppel and breach of fiduciary duty. The Sixth Circuit acknowledged that these claims are cognizable under ERISA, but dismissed them largely on the same basis as it did the vesting claims: the court determined that since GM had reserved the right to change its plan and was not required to warn employees in SPDs of the unvested nature of retiree health benefits, its representations were accurate (A. 27a-31a). Although these claims thus should be restored if the vesting claims

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[3] *See, e.g., Int'l Ass'n of Machinists & Aerospace Workers v. Masonite Corp.,* 122 F.3d 228, 233 (5th Cir. 1997); *Barker,* 122 F.3d at 634-38 (8th Cir.); *Stewart,* 980 F.2d at 703-04 (11th Cir.); *Alexander v. Primerica Holdings, Inc.,* 967 F.2d 90, 96 (3d Cir. 1992); *United Paper Workers Int'l Union v. Champion Int'l Corp.,* 908 F.2d 1252, 1256-57 (5th Cir. 1990); *Bower v. Bunker Hill Co.,* 725 F.2d 1221, 1224 (9th Cir. 1984).

are restored, the overriding concern is the wider swath cut by the Sixth Circuit's decision.

In the decision below, the Sixth Circuit has raised the bar to vesting higher than has any other court. In doing so, the court heightened the conflict among the circuits with respect to the interpretational rules for vesting under SPDs, and created a conflict with respect to the primacy of SPDs over conflicting terms in underlying plans. This Court should intervene to resolve these conflicts that affect every ERISA welfare plan and participant alike.

II. THE SIXTH CIRCUIT'S REJECTION OF THE EARLY RETIREMENT AGREEMENTS CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS UPHOLDING INDIVIDUAL BENEFIT ARRANGEMENTS UNDER ERISA

The Sixth Circuit held that the bilateral early retirement agreements for lifetime health care are unenforceable because they do not contain all or most of the "written instrument" requirements for ERISA plans, 29 U.S.C. § 1102 (A. 23a-25a). The decision conflicts with decisions of other courts of appeals upholding various types of individual benefit agreements and arrangements under ERISA, regardless of whether the employer also offers a more general plan covering the same types of benefits, and regardless of whether the employer complies with the "written instrument" requirements. In contrast with those decisions, the Sixth Circuit's decision fundamentally misconstrues the threshold requirements for ERISA coverage, abrogates ERISA's federal common law of contracts, and deprives employers and employees alike of the flexibility provided by Congress to enter into individual benefit agreements protected by ERISA.

The courts of appeals other than the Sixth Circuit recognize that benefit arrangements need not fulfill all the formalities of the written instrument requirements in order to qualify as ERISA plans. ERISA's definition of a welfare plan includes "any plan, fund, or program . . .

established or maintained by an employer . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1). In the seminal opinion in this area, the Eleventh Circuit held that an ERISA plan is established "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*). The *Dillingham* test has been adopted in every Circuit. *See Kenney v. Roland Parsons Contracting Corp.*, 28 F.3d 1254, 1257-58 (D.C. Cir. 1994) (collecting cases); *Grimo v. Blue Cross/Blue Shield, of Vermont*, 34 F.3d 148, 151 (2d Cir. 1994). The Sixth Circuit now has rejected the *Dillingham* test by requiring compliance with the "written instrument" requirements before a contract for ERISA benefits will be enforced.

The Sixth Circuit's view that ERISA's formal writing requirements supersede the *Dillingham* test has been repudiated by other courts of appeals. Although employers have a fiduciary duty to reduce a plan to writing in accordance with ERISA's requirements, the existence of a written instrument is not a prerequisite to ERISA coverage. *Dillingham*, 688 F.2d at 1372; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985); *see Miller v. Taylor Insulation Co.*, 39 F.3d 755, 760 (7th Cir. 1994). As stated by the court in *Memorial Hospital Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241 & n.5 (5th Cir. 1990): "A formal document designated as 'the Plan' is not required to establish that an ERISA plan exists; otherwise, employers could avoid federal regulation merely by failing to memorialize their employee benefit programs in a separate document so designated."

The rejection of the early retirement agreements for lifetime health care by the Sixth Circuit not only conflicts with the decisions of other circuits, but it also threatens to undermine ERISA's mandate "to protect contractually defined benefits." *Firestone Tire & Rubber Co.*

v. Bruch, 489 U.S. 101, 113 (1989). Beyond the Sixth Circuit, employers and employees are free to forge benefit agreements to cover a variety of situations outside the company's general ERISA plan, without losing ERISA's protections. Individual severance arrangements are a prime example. *See Cvelbar v. CBI Illinois, Inc.*, 106 F.3d 1368, 1376 (7th Cir.), *cert. denied*, 118 S. Ct. 56 (1997); *Williams v. Wright*, 927 F.2d 1540 (11th Cir. 1991) (letter to departing manager an ERISA plan in part); *cf. Frahm v. Equitable Life Assurance Society*, —— F.3d ——, 1998 WL 81457 at *2 (7th Cir. 1998) (discussing ERISA welfare plans: "Bilateral agreements on the length of vacation and amount of severance pay are common, and if these are proper then bilateral agreements about health care must also be proper"). The Third Circuit has determined, in the context of early retirement benefits, that "[r]eservations to the employer to make welfare benefits determinations on an individual basis are not prohibited by ERISA and allowing them furthers the interest of employees." *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 78-79 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992). These decisions are flatly irreconcilable with the Sixth Circuit's rationale requiring compliance with ERISA's written instrument requirements before bilateral contracts for ERISA welfare benefits can be enforced.[4]

The petition should be granted to determine which of "competing congressional purposes," *Varity Corp. v.*

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[4] The defense of the early retirement agreements as independent ERISA plans was argued forcefully to the Sixth Circuit in this case by the Secretary of Labor, who has primary enforcement authority for Title I of ERISA and represents the public interest as well as the interests of plan participants and beneficiaries. *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692-93 (7th Cir. 1986) (*en banc*). In *Cvelbar*, 106 F.3d at 1376, and *Williams*, 927 F.2d at 1545, the courts deferred to the views of the Secretary on the enforceability of single-employee ERISA plans.

Howe, 516 U.S. 489, 497 (1996), governs when an employer contracts for benefits apart from the regular plan. Should the contracts be enforced under the "federal common law of rights and obligations under ERISA-regulated plans," *Firestone Tire & Rubber Co.*, 489 U.S. at 110, irrespective of the level of formality chosen by the employer in promulgating the benefit arrangement? Or should employers be relieved from "their improvident commitments," *Bidlack*, 993 F.2d at 609, because they chose not to comply with all of ERISA's formal writing requirements in forming the contracts? *Cf. Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 844 (1998) (Breyer, J., concurring) (under statute meant to protect employees, treating defective releases as voidable rather than void protects against employer decision "to cancel its own reciprocal obligation" for health benefits or other consideration). Petitioners request the Court to resolve this important conflict to ensure that participants who contract for ERISA benefits are not "afford[ed] less protection . . . than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co.*, 489 U.S. at 114.

III. THE SIXTH CIRCUIT'S DECISION MISAPPLIED FED.R.CIV.P. 23, DEPRIVING CLASS ACTION TREATMENT FOR ERISA CASES WITH UNIFORM CLAIMS

The Sixth Circuit dismantled the early retiree class on the basis that there was no commonality or typicality of factual or legal issues under Fed. R. Civ. P. 23(a) (A. 13a-17a). The court's decision presents an important issue for review because it leaves participants and beneficiaries in large ERISA cases without an effective remedy.

The district court certified the early retiree class under Rule 23(b)(2) because GM "acted or refused to act on grounds generally applicable to the class" (A. 220a, 222a). Instead of focusing on the legal and factual issues common to the class, as Rule 23 requires, the court applied a test of "predominance" applicable to Rule

23(b)(3) cases that has no place in Rule 23(b)(2) cases, and required virtual identity of claims among classmembers. The court's conversion of a dispute involving common issues into one requiring thousands of trials on uniform claims is contrary to both the precepts of Rule 23 and the remedial purposes of ERISA.

The court of appeals acknowledged that there need be only one question of law or fact common to the class, and that there was commonality among both general and early retirees as to plan documents and plan interpretation issues (A. 13a).[5] The court had before it the district court's analysis of the representativeness and consistency of petitioners' classwide proof and the uniformity of GM's defense (A. 122a-124a, 136a-138a), as well as the district court's extensive unappealed factual findings of the uniform "special deal" offered to early retirees in exchange for their early departure from GM (A. 128a-219a).

Instead of focusing on these representative legal and factual issues common to the class, however, the Sixth Circuit focused almost exclusively on differences among individual classmembers (A. 14a-15a), and "each individual's particular interactions with GM" (A. 16a). The court concluded that the named plaintiffs could not advance the interests of the entire early retiree class because "[a] named plaintiff who proved his own claim would not necessarily have proved anybody else's claim" (*id.*).

This treatment inappropriately applied Rule 23(b)(3)'s test for predominance in a Rule 23(b)(2) case. "[T]he question of whether common issues 'predominate' over in-

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[5] While stating that the general retirees "may have been better-suited for class treatment than the early retirees," the court concluded that the non-certification of general retirees was "unexceptionable" because their primary claims had already been decided against them before the class certification decision (A. 12a). Thus, if the general plan issues are revived, the class certification question for the general retirees and the general plan issues will also be revived.

dividual ones has no place in determining whether a case should be certified under 23(b)(2)." *Forbush v. J. C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993); *accord Adamson v. Bowen*, 855 F.2d 668, 675-76 (10th Cir. 1988).

Requiring named plaintiffs to "prove[] anybody else's claim" is a concept of virtual identity of claims embodied nowhere in Rule 23; indeed, it is a concept antithetical to the typicality requirement of Rule 23(a). *See Adamson*, 855 F.2d at 676 ("differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory"); Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.13 at 3-76 (3d ed. 1992) ("plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory").

Consideration of individual differences among classmembers cannot substitute for the commonality and typicality inquiry, which looks at traits of the class as a whole to determine if there is a "sufficient unity" to bind the interests of absent classmembers. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997). By doting on differences rather than similarities among early retiree classmembers, the Sixth Circuit inverted the Rule 23 process. Along with the concededly common issues the early retirees shared with the general retirees, the court needed look no further than "the common question of what GM promised [early retirees] in order to induce them to retire" (A. 51a) (Martin, C.J., dissenting).

The Sixth Circuit's decertification of the early retiree class places judicial relief out of reach for ERISA participants subjected to common treatment by a large employer. A writ should issue to the Sixth Circuit to review the standards for commonality and typicality in a manner that

gives due regard to Rule 23 and ERISA's purposes, and that leaves the courthouse doors open for participants in large ERISA cases.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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April 1998

Supreme Court, U.S.
FILED
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT D. SPRAGUE, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 94-1896, 94-1897, 94-1898, 94-1937

ROBERT D. SPRAGUE, *et al.*,
Plaintiffs-Appellees/
Cross-Appellants,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellant/
Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 90-70010—John Feikens, District Judge

Argued April 23, 1997
Decided Jan. 7, 1998

Before: MARTIN, Chief Judge; LIVELY, MERRITT, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, and COLE, Circuit Judges.

NELSON, J., delivered the opinion of the court, in which RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, and DAUGHTREY, JJ., joined.

LIVELY, (pp. 406-08) and MERRITT, JJ. (p. 408), delivered separate opinions concurring in part and dissenting in part. MARTIN, C.J. (pp. 408-16), delivered a separate dissenting opinion, in which MOORE and COLE, JJ., joined.

OPINION

DAVID A. NELSON, Circuit Judge.

This is a purported class action in which the plaintiffs —retired employees of the defendant, General Motors Corporation—allege that GM violated the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), by denying them fully "paid-up" lifetime health care benefits. The district court certified a class of some 50,000 employees who had taken early retirement, but the court declined to grant class status to about 34,000 "general retirees" who had retired in accordance with the company's normal criteria. As to the general retiree plaintiffs, the court held that the benefits in question did not vest under the pertinent plan documents. As to the early retirees, however, the district court held that each of the 50,000 members of the class had entered into a separate contract that called for the benefits in question to be furnished for life at no cost to the recipient. In the alternative, the court ruled that GM was estopped to rely on the terms of the plan documents to defeat the claims of any early retiree.

We shall affirm the judgment of the district court as to the general retirees, but reverse the court's certification of the class of early retirees. Insofar as the merits of the claims asserted by the named plaintiffs are concerned, we conclude that the claims fail as a matter of law.

I

A

In 1961 General Motors began paying part of the cost of health insurance for its salaried retirees [1] and their surviving spouses. Three years later GM assumed the full cost of basic health insurance for its salaried retirees, and in 1968 it extended this benefit to surviving spouses as well. (In the interest of simplicity, further reference to surviving spouses will generally be omitted.)

In addition to basic health insurance, GM offered its salaried retirees supplemental coverage under what was called the Comprehensive Medical Expense Insurance Program. Participants in this optional program were required to pay a share of the premiums, and co-payment was required for certain medical services. There were also annual deductibles.

Prior to 1985 the health care benefits were provided through arrangements with private insurers. The insurers issued each covered person a certificate of insurance describing the terms and conditions of the underlying policy.

GM became fully self-insured in 1985. At that time the company prepared a document, entitled "The General Motors Health Care Insurance Program for Salaried Employees," that set forth the terms and conditions of GM's self-insured health care program. The district court found that this document, together with subsequent documents announcing changes in coverage, comprised GM's health care benefits plan from and after 1985.[2] The new plan gave

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[1] As used here, the term "salaried retirees" signifies non-union GM employees who had been receiving salaries, rather than hourly wages, at the time they retired. All of the plaintiffs are either salaried retirees or the surviving spouses of salaried retirees.

[2] Although the content of the plan was not static, this fact has no relevance here; the district court found, and we agree, that all versions clearly reserved to GM the right of amendment or termina-

participants a choice between traditional fee-for-service coverage and enrollment in a managed care organization. GM continued its supplemental coverage program, shortening the name to the Comprehensive Medical Expense Program.

GM has long made it a practice to inform its salaried employees and retirees of their health care coverage by providing them booklets containing summaries of the company's health insurance policies and programs. Prior to 1974 GM put out a booklet entitled "The GM Insurance Program for Salaried Employees." After ERISA took effect in 1974 the booklet became "Highlights of Your GM Benefits." Beginning in 1977 GM also issued a booklet called "Your Benefits in Retirement." Each of these publications went through a series of different editions.

A number of the booklets contained language informing plan participants that the health care plan called for GM to pay health insurance costs during retirement:

> • "If you retire . . . and are eligible to receive retirement benefits under the provisions of the GM Retirement Program for Salaried Employees, you may keep your basic hospital, surgical and medical expense coverages in effect. . . . GM will pay the full monthly premium or subscription charge for such coverages." The General Motors Insurance Program for Salaried Employees (1968). The 1971 version was nearly identical.
>
> • "Hospital-Medical Coverages: Your basic coverages will be provided at Corporation expense for your lifetime. . . ." Highlights of Your GM Benefits (1974).

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tion. We shall therefore refer to a single GM "plan," recognizing that this is something of a simplification.

- "Your basic health care coverages will be provided at GM's expense for your lifetime. . . ." Your Benefits in Retirement (1977).

- "General Motors pays the full cost of any basic health care coverages that are continued for most retired employees and for eligible surviving spouses and children of deceased retirees." Your Benefits in Retirement (1977).

However, most of the booklets also put plan participants on notice of GM's right to change or terminate the health care plan at any time:

- "General Motors believes wholeheartedly in this Insurance Program for GM men and women, and expects to continue the Program indefinitely. However, GM reserves the right to modify, revoke, suspend, terminate, or change the Program, in whole or in part, at any time. . . ." The General Motors Insurance Program for Salaried Employees (1965, 1968, and 1971).

- "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet." Your GM Benefits (1985).

- "The Corporation reserves the right to amend, modify, suspend, or terminate its benefit Plans or Programs by action of its Board of Directors." Your Benefits in Retirement (1985).

B

For more than two decades GM has engaged in systematic reductions in the size of its salaried workforce. In this connection the company has launched special early retirement programs designed to induce salaried workers to retire before reaching normal retirement age. The inducements have included, among other things, offers to provide pension benefits to early retirees at levels not reduced to reflect the longer periods over which such

benefits can be expected to accrue. Some of the early retirement programs were company-wide initiatives, while others applied to a particular plant, division, or group of plants or divisions.

Salaried employees who accepted early retirement were often asked to sign documents evincing their acceptance of the terms of the particular program under which they were retiring. From 1974 until 1984 GM utilized a so-called "short form" statement of acceptance. This document typically included language along the following lines:

> "Management has discussed with me the possibility of retiring under the Special Early Retirement provisions of the General Motors Retirement Program for Salaried Employees. I have evaluated the benefits applicable to me under the provisions of the Program and am agreeable to accepting Special Early Retirement. . . ."

In 1984 GM adopted the "long form" statement of acceptance. It typically read, in part, something like this:

> "Management has discussed with me the option of continuing my employment with General Motors or accepting an immediate special retirement under the Special Retirement provisions of the General Motors Retirement Program for Salaried Employees. I have evaluated the benefits applicable to me under the provisions of the General Motors Corporate Wide Special Separation Program and have decided to accept them.
>
> . . . .
>
> I am satisfied with the terms of the special retirement offer and accept this offer voluntarily with full knowledge of its significance, including the fact that by accepting it I waive any claim in any way connected with my separation from employment with General Motors. I acknowledge that no prior representations,

promises or agreements relating to my employment and retirement have been made by General Motors which are contrary to this agreement and that the special retirement offer and my acceptance of the special retirement offer constitute the entire and only agreement between me and General Motors. I understand that I shall not be eligible for recall to work and shall have no further right to employment with General Motors Corporation or any of its subsidiaries."

Both forms had numerous variants, but all stated in essence that the early retiree had "reviewed the benefits applicable" and "accept[ed] them." In return for such benefits, the early retirees agreed to waive certain causes of action they might have had against GM.

Not all early retirees signed a statement of acceptance. Some merely signed a "statement of intent" to retire, while others apparently signed nothing.

In the course of explaining its special early retirement programs, GM made numerous oral and written representations about the health care beenfits available to early retirees. Most of the early retirees participated in exit interviews where a particular early retirement program was described. These interviews were conducted by plant supervisors, members of the benefits staff, and others. Many of the early retirees also received documents summarizing applicable retirement benefits. These summaries often informed retirees that their health insurance would be paid by GM for life. Again, however, such documents sometimes put the retirees on notice of GM's right to change benefits. Certain summaries advised, for example, that "General Motors Corp. reserves the right to amend, change or terminate the Programs described."

Some early retirees received individualized letters about early retirement programs. And a small number of early retirees explicitly asked GM representatives about future

changes to health care benefits. The answers given, it seems, were accurate—benefits could be changed in the future.

C

Late in 1987 GM announced that early in the following year significant changes would become effective in health care coverage for both salaried employees and retirees. In the case of plan participants who elected traditional fee-for-service coverage, the changes included an annual deductible of $200 for individuals and $250 for families. Fee-for-service participants were required to make 20% co-payments on medical services, up to an annual maximum co-payment of $500. By reason of these two changes, fee-for-service plan participants could find themselves responsible for paying as much as $700 a year (with individual coverage) or $750 (with family coverage) that would previously have been paid by GM.

These were not the only changes made to the health care plan for salaried employees and retirees. Vision and hearing aid coverages were eliminated, for example, while there were cost-sharing increases for participants in the Comprehensive Medical Insurance Program. At the same time, however, some benefits and coverages were improved.

D

The present lawsuit was commenced in August of 1989 by 114 salaried retirees who challenged the legality of the changes to the health care plan that took effect in 1988. The main thrust of the plaintiffs' complaint was that GM had bound itself to provide salaried retirees and their spouses basic health coverage for life, entirely at GM's expense. The right to such coverage vested upon retirement, according to the plaintiffs, so the coverage could never be changed or revoked.

Seven separate causes of action were pleaded: (1) failure to maintain the written plan documentation required

by ERISA; (2) violation of the health care plan; (3) breach of fiduciary duty; (4) breach of contract; (5) equitable or promissory estoppel; (6) failure to supply requested information; and (7) failure to comply with the requirements for summary plan descriptions. The named plaintiffs purported to represent a class of some 84,000 similarly-situated individuals, about 50,000 of whom were early retirees and 34,000 of whom were general retirees.[3]

The district court entered partial summary judgment in favor of GM after making the following rulings:

- the plaintiffs' benefits did not vest under the terms of the welfare plan, *Sprague v. General Motors Corp.*, 768 F.Supp. 605, 610-11 (E.D. Mich. 1991) ("*Sprague I*");
- the summary plan descriptions generally put the plaintiffs on notice of GM's right to amend or terminate the plan, *id.*; and
- the plaintiffs had no claim for breach of fiduciary duty, GM not having acted in a fiduciary capacity when amending the plan, *id.* at 612.

After *Sprague I*, the district court allowed the early retirees to proceed on a bilateral contract theory and allowed everyone to proceed on an estoppel theory. The procedural course of the litigation was further shaped by the following pretrial rulings:

- the plaintiffs were not entitled to a jury trial, *Sprague v. General Motors Corp.*, 804 F.Supp. 931 (E.D. Mich. 1992);

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[3] The term "early retirees" refers to salaried, non-union employees who agreed to retire between 1974 and 1988 under one of GM's special early retirement programs. The term "general retirees" refers to salaried, non-union employees who "voluntarily retired, either at age 65 or before, and were able to do so without GM's consent, pursuant to the terms of the General Motors Retirement Program for Salaried Employees." *Sprague v. General Motors Corp.*, 843 F.Supp. 266, 269 (E.D. Mich. 1994).

- the general retirees could not proceed as a class; and
- the early retirees could proceed as a class pursuant to Rule 23(b)(2), Fed. R. Civ. P.

Following a lengthy bench trial, the district court made these rulings on the merits:

- GM was found to have made a bilateral contract with each early retiree to vest health care benefits at retirement, *Sprague v. General Motors Corp.*, 843 F.Supp. 266, 299 (E.D. Mich. 1994) ("*Sprague II*");
- these bilateral contracts were held to be enforceable as ERISA plans or as modifications to the general plan, *id.*[4];
- GM was held not to be estopped from changing the health care benefits of the general retirees, to whom it made no promises to vest benefits, *Sprague v. General Motors Corp.*, 857 F.Supp. 1182, 1188-89 (E.D. Mich. 1994) ("*Sprague III*");
- GM was held to be estopped from changing the health care benefits of the early retirees based on the oral and written representations it made to them, *id.* at 1190-92; and
- GM was enjoined during this appeal from making further adverse changes to the health care benefits of the prevailing plaintiffs, *id.* at 1192-93.

In August of 1994 the district court entered a final judgment embodying all of its previous rulings. The plaintiffs and GM perfected timely appeals, and each of the

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[4] After *Sprague II*, the plaintiffs voluntarily dismissed their claims for failure to supply requested information and failure to comply with the requirements for summary plan descriptions. Pursuant to stipulation, the claim arising from the alleged failure to maintain a written plan instrument was dismissed with prejudice.

atorementioned rulings was challenged by one side or the other. The appeals were consolidated, and a three-judge panel of this court affirmed the rulings in favor of the early retirees and remanded the case for reconsideration of the issues (except the plaintiffs' jury demand) on which the district court had held for GM. *See Sprague v. General Motors Corp.*, 92 F.3d 1425 (6th Cir. 1996). A majority of the active judges of this court subsequently voted to rehear the case *en banc* and the panel decision was thereby vacated. 102 F.3d 204 (6th Cir. 1996). Supplemental briefs having been filed, and the case having been argued before the full court, we are ready to issue our final decision.

II

In certifying a class of 50,000 early retirees, the district court concluded that the class satisfied the four prerequisites of Rule 23(a), Fed. R. Civ. P. (numerosity, commonality, typicality, and adequacy of representation)[5] and that the action could be maintained under Rule 23(b)(2).[6] The class was then divided into four subclasses, as per-

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[5] Rule 23(a) reads as follows:

"Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Rule 23(a), Fed. R. Civ. P.

[6] "Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief, or corresponding declaratory relief with respect to the class as a whole. . . ." Rule 23(b)(2), Fed. R. Civ. P.

mitted by Rule 23(c)(4). The subclasses consisted of (1) early retirees who signed "long form" statements of acceptance of early retirement, (2) those who had signed "short form" statements of acceptance, (3) those who had signed only "statements of intent" to retire early, and (4) those for whom no relevant documents could be found. (As we have said, the court refused to certify the general retirees as a class.) GM appeals the certification of the class of early retirees, while the plaintiffs appeal the district court's refusal to certify a class of general retirees.

Although we will reverse a class certification decision only if the district court abused its discretion, *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 895 (6th Cir.), *cert. denied*, —— U.S. ——, 117 S.Ct. 173, 136 L.Ed.2d 114 (1996), a district court may not certify any class without "rigorous analysis" of the requirements of Rule 23. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982). No class that fails to satisfy all four of the prerequisites of Rule 23(a) may be certified, and each class meeting those prerequisites must also pass at least one of the tests set forth in Rule 23(b). *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

We conclude that the district court's refusal to certify a class or sub-class of general retirees was unexceptionable as far as the plaintiffs are concerned. Ironically, perhaps, the general retirees may have been better-suited for class treatment than the early retirees. The general retirees, not having received individualized inducements to retire, base their claims on the plan itself and the summary plan description booklets—documents common to all salaried retirees. But by the time it made a certification decision, the district court had rejected the primary claim of the named general retiree plaintiffs. For reasons we shall explain presently, we believe that the court acted correctly in doing so. The plaintiffs have no basis for complaining of a refusal to certify a proposed class where the repre-

sentatives of the class cannot prevail on the merits, and the defendant, GM, is not contesting the decision not to certify a class of general retirees.

A

We turn now to the class that was certified—the early retirees. With regard to Rule 23(a), we shall confine our analysis to the commonality and typicality requirements.

The commonality requirement deals with shared questions of law or fact. Although Rule 23(a)(2) speaks of "questions" in the plural, we have said that there need only be one question common to the class. *American Med. Sys.*, 75 F.3d at 1080. It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation.

When this case began, the claims of all members of the purported class, both general retirees and early retirees, did share certain common issues. All salaried retirees' health care benefits were governed by the same welfare plan, and the proper interpretation of the plan was at issue. Similarly, GM issued a common set of summary plan descriptions the significance of which was at issue as well. By the time the district court took up the certification question, however, these common questions had already been decided. The district court did not certify the class until after its decision in *Sprague I*, where the court ruled (a) that the plan unambiguously reserved GM's right to amend or terminate the plan, and (b) that the summaries did not change the reservation of this right.

The issues that remained after *Sprague I* were anything but common. *Sprague I*, as we have said, permitted the early retirees to proceed on a bilateral contract theory and

an estoppel theory.[7] Neither theory was susceptible to class-wide treatment. The premise of the bilateral contract theory was that GM had made an individual "side deal" with each early retiree. Each putative side deal involved any pertinent document the retiree might have signed—and the statements of acceptance, as we have seen, said nothing more about health insurance than that the early retiree accepted the "applicable" benefits—as well as any pertinent representations GM might have made to the retiree, whether orally, in writing, or both. A retiree might have signed a "long form" statement of acceptance, or a "short form," or a "statement of intent" to retire, or nothing at all. He might have heard GM officials speak about the special early retirement program at a group meeting, or might have seen a program summary compiled by GM, or might have had a one-on-one meeting with his supervisor or with a GM benefits person. He might have retired from a particular plant in a particular division and been given a particular set of representations, or he might have retired from a different plant in a different division and been given a completely different set of representations. Proof that GM had contracted to confer vested benefits on one early retiree would not necessarily prove that GM had made such a contract with a different early retiree.

The plaintiffs' estoppel theory was even less susceptible to class-wide treatment. An estoppel claim requires proof of what statements were made to a particular person, how the person interpreted those statements, and whether the person justifiably relied on the statements to his detriment. See Part IV, *infra*; *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991). Because of their focus

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[7] After *Sprague I*, the plaintiffs' claims for failure to maintain a written plan, failure to provide requested information, and failure to comply with summary plan decription requirements remained temporarily intact. Although these counts might have raised potentially common questions, they were eventually dismissed. *See* note 4, *supra*.

on individualized proof, estoppel claims are typically inappropriate for class treatment. *See Jensen v. SIPCO, Inc.*, 38 F.3d 945, 953 (8th Cir. 1994) (estoppel "must be applied with factual precision and therefore is not a suitable basis for class-wide relief"), *cert. denied*, 514 U.S. 1050, 115 S.Ct. 1428, 131 L.Ed.2d 310 (1995).

GM's statements to the early retirees were not uniform. Among other things, the statements varied (1) based on the person making the representation, (2) based on the particular special early retirement program that applied, (3) from facility to facility, and (4) from time to time. Given the wide variety of representations made, there must have been variations in the early retirees' subjective understandings of the representations and in their reliance on them. Some retirees might have interpreted GM's statements to mean that their benefits were vested. Others might have understood that their benefits were subject to change. Some early retirees might have relied on GM's statements about health care benefits, while for others the statements might have made no difference at all in the decision to retire early.

Given these myriad variations, it seems to us that the plaintiffs' claims clearly lacked commonality. *See American Med. Sys.*, 75 F.3d at 1081 (granting mandamus to reverse a class certification where each claim turned on issues of reliance, causation, and damages that were peculiar to each class member). Because each plaintiff's claim depended upon facts and circumstances peculiar to that plaintiff, class-wide relief was not appropriate.[8]

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[8] The majority opinion in *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877 (6th Cir. 1997) (a case decided after the instant opinion was circulated to the en banc court) does not purport to limit the holding of *American Med. Sys.* Unlike *American Med. Sys.*, the *Bittinger* case did involve a question of law or fact common to the class: relying on the same collective bargaining agreement, each class member in *Bittinger* claimed that the agreement contained a guaranty of lifetime, fully-funded benefits. *Bittinger*, 123 F.3d at 884. No such common question was before the district court when class certification was granted in the case at bar. Even if all of the

B

The class of early retirees fails the typicality test of Rule 23(a) as well. This test "limit[s] the class claims to those farily encompassed by the named plaintiffs' claims." *American Med. Sys.*, 75 F.3d at 1082 (citation and quotation omitted).

> "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. . . . A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *Id.* (citing 1 Herbert B. Newberg and Alba Conte, 1 *Newberg on Class Actions*, § 3-13, at 3-75, 76 (3d ed. 1992) (internal quotations omitted)).

In pursuing their own claims, the named plaintiffs could not advance the interests of the entire early retiree class. Each claim, after all, depended on each individual's particular interactions with GM—and these, as we have said, varied from person to person. A named plaintiff who proved his own claim would not necessarily have proved anybody else's claim. See *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993) (typicality requirement was not satisfied where different groups of class members received different representations), *cert. denied*, —— U.S. ——, 117 S.Ct. 305, 136 L.Ed.2d 222 (1996). The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class. That premise is not valid here.

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other requirements of Rule 23 had been met here, the absence of commonality would have necessitated a denial of class certification.

The course of this litigation in the district court amply demonstrates, we think, that typicality was lacking. The district court took testimony from more than three hundred class members in an effort to obtain a purportedly representative sample of the representations and communications made by GM. That it was necessary to do so strongly suggests to us that class-wide reliew was improper.

We conclude that the district court abused its discretion in certifying the class of early retirees. Some class members may have signed the same form, some may have received the same documents, or some may have attended the same meetings about the early retirement program, but taken as a whole the class claims were based on widely divergent facts. Class-wide relief was awarded here without any necessary connection to the merits of each individual claim. Rule 23 does not permit that result.[9]

The claims of the 114 named plaintiffs are still before the court, however, regardless of whether these individuals represent the purported class. We see no reason not to address the merits of the named plaintiffs' claims.

III

A

The plaintiffs' first theory of recovery is that GM committed a breach of the terms of the plan documents when it implemented the changes in 1988. Under the plan documents, according to the plaintiffs, their health care benefits were vested—and having vested, the benefits could not be altered without the plaintiffs' consent.

The district court rejected this theory, holding that the plan documents, including the summary plan descriptions, effectively reserved a right on GM's part to amend or terminate the plan. The court's holding, in our view, was

[9] The district court's use of subclasses did not solve the problem. Subclasses are not a substitute for compliance with Rule 23.

manifestly correct; we shall affirm the summary judgment that was entered in favor of GM on this issue.

ERISA distinguishes between pension plans and welfare plans. A pension plan "provides retirement income to employees" or "results in a deferral of income by employees for periods extending to the termination of . . . employment or beyond. . . ." 29 U.S.C. § 1002(2). Welfare plans, in contrast, include plans "established or . . . maintained for the purpose of providing . . . medical, surgical, or hospital care or benefits. . . ." *Id.* § 1002(1). Because the plan in question here provided health insurance to its participants, it was a welfare plan. See *Musto v. American Gen. Corp.*, 861 F.2d 897, 901 n. 2 (6th Cir. 1988) (a medical insurance plan is a welfare plan), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989).

Welfare plans are specifically exempted from vesting requirements to which pension plans are subject. 29 U.S.C. § 1051(1). Therefore, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S.Ct. 1223, 1228, 131 L.Ed.2d 94 (1995) (citing *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990)). Employers may vest welfare benefits if they choose to do so, however. See *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, —— U.S. ——, ——, 117 S.Ct. 1513, 1516, 137 L.Ed.2d 763 (1997) (an employer may "contractually cede[ ] its freedom" not to vest benefits). See also *In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986), where we held that "the parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated." To the same effect see *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993).

To vest benefits is to render them forever unalterable. Because vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest "must be found in the plan documents and must be stated in clear and express language." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870, 114 S.Ct. 196, 126 L.Ed.2d 154 (1993); see also *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 58 F.3d 896, 902 (3d Cir. 1995) (same); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994) (same), *cert. denied*, 514 U.S. 1057, 115 S.Ct. 1442, 131 L.Ed.2d 321 (1995). It is the plaintiffs' burden to prove GM's intent to vest. *Id.*

The plaintiffs have not seriously disputed that the plan itself permitted GM to amend or terminate benefits.[10] Instead the plaintiffs focus on the plan summaries, which must "be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1).

In *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988), we held that "statements in a summary plan are binding and if such statements conflict with those in the plan itself, the summary shall govern." Application of the *Edwards* principle, the plaintiffs say, compels a judgment in their favor. We disagree.

The principle announced in *Edwards* was based on ERISA's directive that plan administrators furnish summary plan descriptions to participants and beneficiaries. This requirement did not become generally effective until 1977. See *Musto*, 861 F.2d at 904. We could not hold GM liable for violations of a statutory requirement based

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[10] The 1985 plan expressly stated that "[a]ny rate of payment by the enrollee and any other terms and conditions of the Program may be changed at any time by the Corporation."

on actions taken prior to the effective date of that requirement. If the plaintiffs have any cause of action based on GM's pre-1977 summaries, it is probably not one based on ERISA. It appears likely that only the booklets issued in 1977 and thereafter are relevant to the inquiry.[11] We shall assume that all of the booklets issued in 1977 or later were intended to serve as summary plan descriptions.

Most of the summary plan descriptions unambiguously reserved GM's right to amend or terminate the plan. For example:

> • "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet." Your GM Benefits (1984).
>
> • "The Corporation reserves the right to amend, modify, suspend, or terminate its benefit Plans or Programs by action of its Board of Directors." Your Benefits in Retirement (1985).

The plaintiffs counter by pointing out that these summaries also told them that their health coverage would be paid "at no cost to" them and "for [their] lifetime[s]." Such language, they argue, created an ambiguity within the summaries that must be resolved by extrinsic evidence.

We have rejected this argument in the past, and we reject it again now. We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change.

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[11] The plaintiffs argue that the summary plan description requirement was phased in beginning in 1974, and that only employers who sought some sort of temporary exemption were excused from immediate compliance. GM, they contend, never proved that it had such an exemption. The plaintiffs may be correct that we should look at the summaries issued in 1974 and thereafter, not just those issued in 1977 and thereafter. Either way, the result would be the same: for the reasons developed in the text, the plan summaries did not deprive GM of the right to amend or terminate the plan.

> "To read this summary as saying that the plan can never be changed in such a way as to mandate retiree contributions for continued medical coverage is to read into the summary something its authors did not put there (a promise to provide lifetime 'paid up' medical insurance), while reading out of the summary something that clearly was put there (an express reservation of right to change the plan)." *Musto*, 861 F.2d at 906.

As the Third Circuit explained in a similar case, "the promise made to retirees was a qualified one: the promise was that retiree medical benefits were for life provided the company chose not to terminate the plans, pursuant to clauses that preserved the company's right to terminate the plan under which those benefits are provided." *Unisys Corp.*, 58 F.3d at 904 n. 12; see also *Wise*, 986 F.2d at 934.

Not all of the summaries clearly stated that GM could amend or terminate the plan. But the failure to allude to this power in some of the booklets did not prejudice GM's right, clearly stated in the plan itself, to change the plan's terms.

In the first place, the principle announced in *Edwards* does not apply to silence. *Cf. Foltice v. Guardsman Prods.*, 98 F.3d 933, 938 (6th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S.Ct. 1312, 137 L.Ed.2d 475 (1997); *Edwards*, 851 F.2d at 136 ("if such statements *conflict* with those in the plan itself, the summary shall govern") (emphasis added). An omission from the summary plan description does not, by negative implication, alter the terms of the plan itself. *Jensen*, 38 F.3d at 952; *Wise*, 986 F.2d at 938. The reason is obvious: by definition, a summary will not include every detail of the thing it summarizes. GM's failure to include in some summaries a notice of its right to change the plan does not trump the clearly-stated right to do so in the plan itself.

In the second place, GM was not required to disclose in the summary plan descriptions that the plaintiffs' benefits were not vested. See *Jensen*, 38 F.3d at 952 ("a welfare plan SPD [summary plan description] is not required to disclose that plan benefits are not vested"); *Gable*, 35 F.3d at 858 ("ERISA does not require SPDs to specifically address the possibility that those terms might later be changed, as ERISA undeniably permits") (quotation and citation omitted); *Wise*, 986 F.2d at 936 ("ERISA does not mandate the inclusion within SPDs of amendment rights or procedures").

ERISA specifies in detail the information that every summary plan description "shall contain." See 29 U.S.C. § 1022(b). Among the items a summary must include is "a description of the provisions providing for nonforfeitable pension benefits." *Id.* Despite having required that summaries inform plan participants about the vesting of benefits under *pension* plans, Congress did not require such information for *welfare* plans; neither did the Department of Labor in its ERISA reporting and disclosure regulations. See 29 C.F.R. § 2520.102-3(n) (summary plan descriptions shall contain, "[i]n the case of an employee *pension* benefit plan, a description and explanation of the plan provisions for . . . vesting") (emphasis added). The absence of a similar requirement for welfare plans was no mistake. See *Jensen*, 38 F.3d at 952 (the "failure to require SPDs to disclose non-vesting cannot be an inadvertent omission"). ERISA, after all, is a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980), and the reporting and disclosure requirements are themselves "comprehensive." *Curtiss-Wright*, 514 U.S. at 83, 115 S.Ct. at 1230. We decline to apply the judge-made rule of *Edwards* in such a way as to augment the detailed disclosure provisions of the statute.

Neither the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs'

benefits were vested. Accordingly, we conclude that the district court acted correctly in granting summary judgment to GM on the plaintiffs' claim that the company violated the terms of its plan.

B

We turn next to the theory that GM bilaterally contracted with each early retiree to vest benefits. All of the early retirees took retirement under one of the special early retirement programs offered by GM between 1974 and 1988. The early retirees argue that, as the district court held, the statements, promises, and representations GM made to them in connection with these programs, and the documents that they signed, created binding bilateral contracts. The alleged contracts, which supposedly provided for vesting of the early retirees' health care benefits, are said to be enforceable either as modifications to the general plan, or as ERISA plans themselves, or as a matter of federal common law.

ERISA "has an elaborate scheme in place for beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents." *Curtiss-Wright*, 514 U.S. at 83, 115 S.Ct. at 1230. To implement this scheme, ERISA requires that every plan "shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). ERISA also requires, as we have said, a written summary plan description that will "reasonably apprise . . . participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a).

The writing requirement ensures that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 514 U.S. at 83, 115 S.Ct. at 1230 (quoting H. Rep. No. 1280, 93d Cong., 2d Sess. 297, reprinted in 1974 U.S. Code Cong. & Admin. News 5038, 5077-78). And the requirement lends predictability and certainty to employee benefit plans. *Gable*, 35 F.3d at 857.

This serves the interests of both employers and employees. See *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 136 (6th Cir. 1993); *Adams*, 905 F.2d at 947; *Gable*, 35 F.3d at 857; *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988).

"Congress intended that plan documents and SPDs exclusively govern an employer's obligations under ERISA plans." *Moore*, 856 F.2d at 492. We recognize that "[t]his may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised." *Curtiss-Wright*, 514 U.S. at 84, 115 S.Ct. at 1231.

Our court has consistently refused to recognize oral modifications to written plan documents. "[W]e are quite certain," we have explained, "that Congress, in passing ERISA, did not intend that participants in employee benefit plans should be left to the uncertainties of oral communications in finding out precisely what rights they were given under their plan." *Musto*, 861 F.2d at 909-10. Therefore, the "clear terms of a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer." *Id.* at 910; *see also Gordon*, 999 F.2d at 137 (same); *Boyer*, 986 F.2d at 1005 (same). The plaintiffs may not invoke oral statements by GM personnel in order to modify the terms of the written plan.

Neither can we accept the argument that the plan was modified or superseded either by the written "statements of acceptance" signed by some of the named plaintiffs or by the written representations received by some from GM. "That [the defendant's] statements were made in writing is irrelevant as they do not profess to be plan amendments." *Borst v. Chevron Corp.*, 36 F.3d 1308, 1323 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066, 115 S.Ct. 1699, 131 L.Ed.2d 561 (1995). None of GM's representations suggested that the plan was being modified. The statements of acceptance, moreover, merely said that the employee "ha[d] reviewed the benefits applicable to

[him]" and "accept[ed] them." Far from modifying the terms of the welfare plan, it seems to us, this language incorporated the plan's terms.[12]

The statements of acceptance were not ERISA plans themselves. Every ERISA plan must specify a funding mechanism, must allocate operational and administrative responsibilities, and must state how payments are made to and from the plan. 29 U.S.C. § 1102(b)(1)-(2), (4). See *Gable*, 35 F.3d at 857 n.2 (documents that do not satisfy ERISA's requirements for plan documents do not qualify as ERISA plan documents). While it is at least conceivable that an enforceable ERISA plan might not meet all of these requirements, the alleged bilateral contracts at issue here met none of them. The "statements of acceptance" simply did not purport to be ERISA plans, and we decline to treat them as such.

For us to sanction informal "plans" or plan "amendments"—whether oral or written—would leave the law of employee benefits in a state of uncertainty and would create disincentives for employers to offer benefits in the first place. Such a result is not in the interests of employees generally, and it is certainly not compatible with the goals of ERISA. *Cf. Moore*, 856 F.2d at 489: "Altering a welfare plan on the basis of non-plan documents and communications, absent a particularized showing of conduct tantamount to fraud, would undermine ERISA."

IV

The plaintaiffs argue that GM is estopped from enforcing the terms of the written plan against them. After the bench trial, the district court found that GM made no

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[12] For present purposes, we accept the early retirees' assertion that the phrase "benefits applicable to [the early retirees]" referred to pension *and* welfare benefits. If, as GM plausibly argues and as the context suggests, the phrase referred only to pension benefits, then the "statements of acceptance" have nothing whatever to say about the health care plan.

misleading representations to the general retirees. *Sprague III*, 857 F.Supp. at 1188-89. That finding appears unassailable. As to the early retirees, however, the district court ruled that GM was estopped from enforcing the plan because it misrepresented the plan's terms. *Id.* at 1189-92. In this, we believe, the court erred as a matter of law.

We have held that equitable estoppel may be a viable theory in ERISA cases, at least in regard to welfare plans. *Armistead*, 944 F.2d at 1298. The elements of an equitable estoppel claim, as announced by the *Armistead* panel, are as follows: (1) there must be conduct or language amounting to a representation of material fact; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on, or the party asserting the estoppel must reasonably believe that the party to be estopped so intends; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must reasonably or justifiably rely on the representation to his detriment. *Id.* at 1298.[13]

Principles of estoppel, however, cannot be applied to vary the terms of unambiguous plan documents; estoppel can only be invoked in the context of ambiguous plan provisions. See *Fink v. Union Central Life Ins. Co.*, 94 F.3d 489, 492 (8th Cir. 1996); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 458 n. 12 (11th Cir. 1966), *cert. denied*, —— U.S. ——, 117 S.Ct. 1082, 137 L.Ed.2d 217 (1997). There are at least two reasons for this. First, as we have seen, estoppel requires reasonable or justifiable reliance by the party asserting the estoppel. That party's reliance can seldom, if ever, be reasonable or justifiable if it is inconsistent with the clear and unambiguous terms

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[13] Although we have never explicitly held that promissory estoppel claims are cognizable under ERISA, we see no reason to treat the two forms of estoppel differently. *Cf. Flacche v. Sun Life Assurance Co. of Canada*, 958 F.2d 730, 737 (6th Cir. 1992) (holding that the facts did not support a promissory estoppel theory).

of plan documents available to or furnished to the party. Second, to allow estoppel to override the clear terms of plan documents would be to enforce something other than the plan documents themselves. That would not be consistent with ERISA.

In the case at bar, we conclude that the plaintiffs' estoppel claims fail as a matter of law. As we have said, GM's plan and most of the summary plan descriptions issued to the plaintiffs over the years unambiguously reserved to GM the right to amend or terminate the plan. In the face of GM's clearly-stated right to amend—a right contained in the plan to which the plaintiffs had access and in many of the summaries they were given—reliance on statements allegedly suggesting the contrary was not, and could not be, reasonable or justifiable, especially when GM never told the plaintiffs that their benefits were vested or fully paid-up. See *Musto*, 861 F.2d at 907.

V

The last theory of recovery, applicable only to the early retirees, is that GM was in breach of the fiduciary duty it owed such retirees as administrator of their welfare plan. The district court dismissed this claim in its entirety, holding that an employer is not a fiduciary when it amends or terminates a plan. *Sprague I*, 768 F.Supp. at 612.

The court's holding was correct as far as it went. GM did not act as a fiduciary in deciding to change its health insurance polices. *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S.Ct. 1783, 1789, 135 L.Ed.2d 153 (1996); *Musto*, 861 F.2d at 912. The plaintiffs argue, however, that the district court misconstrued the breadth of their fiduciary duty claim. The claim, they say, encompassed all of GM's oral and written representations to them in connection with the special early retirement programs. We agree with this interpretation of the complaint.

ERISA defines a fiduciary in functional terms:

> "[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

Thus "[f]iduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions." *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158 (3d Cir. 1990). ERISA also prescribes the responsibilities of a fiduciary, which include acting "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose" of "providing benefits to participants and their beneficiaries. . . ." 29 U.S.C. § 1104(a)(1).

In *Varity Corp. v. Howe*, 516 U.S. 489, ——-——, 116 S.Ct. 1065, 1071-73, 134 L.Ed.2d 130 (1996), the Supreme Court held that an employer acted in a fiduciary capacity when making misrepresentations to its employees about their benefit plan. The employer in that case created a new subsidiary to enable the parent to shed some of its debt, knowing that the subsidiary might well fail. *Id.* at ——, 116 S.Ct. at 1068. The employer induced employees to transfer to the new subsidiary with deliberately misleading assurances that the new subsidiary would be financially successful and that employee benefits plan would be financially sound and would not change. *Id.* at ——. 116 S.Ct. at 1069.

The Court held that the employer, in making these misrepresentations about the status of the plan, was exercising "discretionary authority" in connection with the plan's "management" or "administration," as those terms are used in § 1002(21)(A). *Id.* at ——, 116 S.Ct. at 1073. Applying the law of trusts, which it said would

inform the fiduciary inquiry, *id.* at ——, 116 S.Ct. at 1070, the Court stated that "conveying information about the likely future of plan benefits" was a discretionary act of plan administration. *Id.* at ——, 116 S.Ct. at 1073. The employer therefore acted in a fiduciary capacity when it misled its employees, and its misrepresentations amounted to a breach of fiduciary duty.

Varity Corp. teaches that GM may have acted in a fiduciary capacity when it explained its retirement program to the early retirees.[14] As a matter of law, however, we do not believe that GM committed a breach of any applicable fiduciary duty. In the first place, GM never told the early retirees that their health care benefits would be fully paid up or vested upon retirement. What GM told many of them, rather, was that their coverage was to be paid by GM for their lifetimes. This was undeniably true under the terms of GM's then-existing plan.

Explanations of benefits

> "tend to sound promissory by their very nature. While these explanations may state a company's current intentions with respect to the plan, they cannot be expected to foreclose the possibility that changing financial conditions will require a company to modify welfare benefit plan provisions at some point in the future." *Gable*, 35 F.3d at 857.

GM's failure, if it may properly be called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change. There is, in our view, a world of difference between the employer's deliberate misleading of employees in *Varity Corp.* and GM's failure to begin every communication to plan participants with a caveat.

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[14] Other than the plan documents, GM made no representations to the general retirees. We do not see how a breach of fiduciary duty could arise from GM's representations in the plan documents themselves.

In the second place, as we have said, GM was not required to disclose in its summary plan descriptions that the plan was subject to amendment or termination. See 29 U.S.C. § 1022(b); 29 C.F.R. § 2520.102-3. It would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed. See *Curtiss-Wright*, 514 U.S. at 84, 115 S.Ct. at 1231 (Congress did not intend the informational scheme it devised "to be supplemented by a far-away provision in another part of the statute"); *Jensen*, 38 F.3d at 952; see also Part III.A., *supra*.[15] As a matter of statutory construction, a specific statutory provision governs a general one—and here the "comprehensive" disclosure provisions control the broad fiduciary duty standard. The Fourth Circuit agrees:

> "To accept the argument . . . we would have to hold that ERISA's general fiduciary duty provision . . . requires plan fiduciaries to furnish documents to participants and beneficiaries in addition to the documents that ERISA's specific disclosure provision . . . requires the plan administrator to furnish. Such a holding would conflict with the principle that specific statutes govern general statutes." *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S.Ct. 738, 136 L.Ed.2d 677 (1997).

We are not aware of any court of appeals decision imposing fiduciary liability for a failure to disclose information that is not required to be disclosed. At least three circuits have held that there is no fiduciary duty to dis-

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[15] We are mindful that the Supreme Court has cautioned that the fiduciary duty must not be confined to "activities already controlled by other specific legal duties. . . ." *Varity Corp.*, 516 U.S. at ——, 116 S.Ct. at 1074. But when Congress and the Department of Labor have carefully prescribed a detailed list of matters that must be disclosed to plan participants and beneficiaries, it ill-behooves federal judges to add to that list.

close planned changes in benefits or even the termination of the plan before those actions become official. *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir.), *cert. denied*, —— U.S. ——, 117 S.Ct. 302, 136 L.Ed.2d 220 (1996); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 229 (3d Cir. 1989); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986). *A fortiori*, there can be no fiduciary duty to disclose the *possibility* of a future change in benefits. See *Restatement (Second) of Trusts* § 173, Comment d (1959) ("Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information").

Had an early retiree asked about the possibility of the plan changing, and had he received a misleading answer, or had GM on its own initiative provided misleading information about the future of the plan, or had GM been required by ERISA or its implementing regulations to forecast the future, a different case would have been presented. But we do not think that GM's accurate representations of its current program can reasonably be deemed misleading. GM having given out no inaccurate information, there was no breach of fiduciary duty.

VI

Although the plaintiffs sought a jury trial on their ERISA claims, our circuit precedent teaches that they were not entitled to one. *Daniel v. Eaton Corp.*, 839 F.2d 263, 268 (6th Cir.), *cert. denied*, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 52 (1988); see also *Bair v. General Motors Corp.*, 895 F.2d 1094 (6th Cir. 1990) (same). The plaintiffs argue that subsequent Supreme Court decisions cast doubt on these precedents, see, *e.g.*, *Chauffeurs, Teamsters, and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990), but we need not address that question; because we reject the plaintiffs' claims as a matter of law, there was nothing for a jury to decide.

VII

Finally, the early retirees argue that the district court erred in issuing a limited injunction pending appeal. They contend that the court should have issued an injunction coextensive with the scope of GM's liability as determined by the court. None of their claims having merit, however, the early retirees obviously are not entitled to an injunction of any sort. The injunction will be vacated.

VIII

The certification of the class of early retirees is REVERSED, and the injunction is VACATED. Insofar as it applies to any unnamed member of the plaintiff class, the final judgment of the district court is VACATED. Insofar as it applies to the named plaintiffs, the final judgment is AFFIRMED IN PART and REVERSED IN PART. The parties shall bear their own costs.

LIVELY, Circuit Judge, concurring in part and dissenting in part.

As a member of the original panel that heard this appeal I voted to remand both the issues raised by the general retirees and those raised by the early retirees. Further study in light of Judge Nelson's opinion convinces me that the majority is correct in holding that the claims of the general retirees should be dismissed. Accordingly, I concur in the majority opinion to the extent it affirms summary judgment for General Motors on the claims of the general retirees.

I agree with Judge Martin's dissent, however, in its conclusion that the district court correctly certified a class action for the claims of the early retirees and that the early retirees had vested health care benefits for the rest of their lives.

There is a fundamental difference between the claims of the two sets of retirees. The general retirees based their claims solely on plan documents, which reserved the right to change terms of the plan. The early retirees, on the other hand, claimed a new agreement with GM, supported by a new consideration—their agreement to leave their employment early, and as a consequence to save GM significant future costs. I believe the district court correctly found that GM entered into bilateral contracts with the early retirees. Further, I believe that the district court's findings of fact and conclusions of law following the bench trial are entitled to deference by this court, and should be affirmed.

With respect to the class action issue, the district court did not abuse its discretion in certifying a class consisting of the early retirees. The claims of the early retirees were all based on a common contention: that GM created a new condition for them with respect to future health care benefits by entering into new agreements that accorded

them vested rights never given to general retirees. Thus, the "commonality" requirement of Rule 23(a) was satisfied.

I believe, further, the "typicality" requirement was met by the district court's creation of four subclasses, defined by the evidence upon which the early retirees relied (long form statement of acceptance, short form statement of acceptance, statement of intent to retire, and oral representations at time of entering into agreement for early retirement). The majority states that typicality is lacking because "[a] named plaintiff who proved his own claim would not necessarily have proved anybody else's claim." *Supra*, at 399. This statement appears to rely on a statement in *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996). Yet, what *American Med. Sys.* actually says is that "in pursuing his own claims, the named plaintiffs will also *advance the interests of class members*." *Id.* at 1082. (emphasis added). I believe the interests of class members in establishing the underlying contention that all were accorded vested rights by the new bilateral agreements would be advanced by each named plaintiff or class member pursuing his own claim. *American Med. Sys.* does not require that a named plaintiff *prove* anybody else's claim by proving his own. *American Med. Sys.* also quotes with approval the following language from *Senter v. General Motors Corp.*, 532 F.2d 511, 525 n. 31 (6th Cir.), *cert. denied*, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976): "[t]o be typical a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." 75 F.3d at 1078.

The majority concedes that while welfare plan benefits are not vested by the terms of ERISA, an employer can give up its freedom not to vest such benefits. I believe this is a case where the employer did just that. The district court found that "early retirement was presented . . . as a special package deal that included health care, separate and distinct from the regular GM retirement pro-

gram." *Sprague v. General Motors Corp.*, 843 F.Supp. 266, 271 (E.D. Mich. 1994) (*Sprague II*). This finding is not clearly erroneous; to the contrary, it is supported by substantial evidence. Unlike the general retirees, the early retirees were sought out by GM and offered inducements to leave their employment before reaching the normal retirement age. The general retirees necessarily had to rely only on plan documents that unilaterally created health care benefits. The early retirees, on the other hand, relied on new agreements that modified the welfare benefit plan. Rather than having only the employer's unilateral "gift" of health care coverage, they bargained with the employer for their coverage. I believe under the circumstances of this case the district court properly considered the evidence of the early retirees that went beyond plan documents. The district court's findings, based on this evidence, supported its conclusion that GM was estopped to deny the early retirees lifetime health benefits.

I also believe the majority is in error in concluding that GM did not act in a fiduciary capacity in its dealings with the early retirees. While I agree that an employer does not ordinarily act as a fiduciary in administering a welfare plan, it seems to me that the manner in which GM reached early retirement agreements with these employees necessarily involved a fiduciary relationship. The majority stresses that GM was not required to state, along with its explanation to the retirees that health care coverage was to be provided for their lifetimes at GM's expense, that it also retained the right to change this commitment. I disagree. Given that GM was seeking a new agreement from those employees that changed their previous expectations about the time of their retirement, GM could not in equity remain silent if it intended to reserve a right to change or eliminate this important benefit in the future. It was misleading to tell these employees they would have company-provided health care throughout their lives while at the same time failing to advise them that it was claiming to reserve the right to withdraw the benefit after the

employees accepted early retirement. Given the setting in which GM was presenting these employees with a new set of conditions relating to their retirement, GM had a fiduciary obligation to be completely open, with no undisclosed conditions.

It seems to me that the majority reads *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), much too narrowly. In *Varity*, the Supreme Court emphasized the applicability of trust principles and the fundamental requirement of ERISA that a fiduciary "discharge his duties with respect the plan solely in the interest of the participants and beneficiaries." (quoting ERISA § 404(a)). *Varity*, 516 U.S. at ——, 116 S.Ct. at 1074. Viewed in light of trust principles and this ERISA requirement, GM owed a duty to be completely open and forthcoming with the employees that it wanted to retire early. It was unfair, at this juncture in their relationship, to rely on a reservation that was neither discussed nor referred to. This was a situation where silence was misleading. The reservations in the plan and descriptive materials all related to normal retirement. When, at GM's instigation, some employees were induced to retire early, they should have been told that these reservations applied to the new relationship created by early retirement if that was GM's intent. There was a fiduciary duty to inform them, and GM breached that duty.

I respectfully dissent from the majority's denial of all relief to early retirees, both named plaintiffs and putative class members.

MERRITT, Circuit Judge, concurring in part and dissenting in part.

I agree with two conclusions found in Judge Nelson's opinion for the *en banc* court: (1) that District Judge Feikens was correct in declining to certify the 34,000 general retirees as a class because they were on notice that General Motors could always modify their health benefits, even after retirement; and (2) that there are too many differences in the various contractual arrangements and representations made to individual early retirees to merit class certification and unified treatment. I do not agree, however, that the actions of the named plaintiffs who were early retirees should be dismissed. I agree with that portion of Chief Judge Martin's dissenting opinion that calls for a remand of this portion of the case to the District Court for consideration of the individual cases of the named plaintiffs on the merits. It appears that at least some of the early retirees had vested lifetime benefits at the time of retirement unencumbered by any reservation by GM that it retained the right to modify. These named plaintiffs should not be summarily thrown out of court merely because the class actions fail.

BOYCE F. MARTIN, JR., Chief Judge, with whom Judges MOORE and COLE join, dissenting.

The question before this Court is whether General Motors has created a lifetime right to basic health care for its retirees. The en banc majority found that former General Motors salaried employees do not have any vested right in free lifetime health care, which they were promised at their retirement. This decision not only makes it more difficult for tens of thousands of retired General Motors employees to receive the health care they thought they deserved, but it also flouts the law. Basically, the en banc majority finds no claim. It ignores ambiguities and conflates arguments. I believe that a finer caliber of analsyis is necessary. I write to highlight my differences with the en banc majority and to point out shortcomings in its analysis.

The en banc majority found in General Motors's favor on every issue and claim. The en banc majority denied class certification because it found that one group of retirees had no chance of winning on the merits and that the other group of retirees lacked the requisite typicality and commonality. It further found that the claims of the 114 named plaintiffs were without merit. According to the en banc majority, the retirees did not have a vested right to health care because General Motors effectively reserved its right to amend the plan in all cases. It also found that the retirees did not have a bilateral contract with General Motors for lifetime benefits, and that plaintiffs' estoppel claims failed because General Motors unambiguously reserved the right to change benefits. Finally, the en banc majority determined that General Motors did not breach its fiduciary duty to retirees because it gave out no inaccurate information. I disagree with the conclusions the en banc majority reached.

The facts have been stated repeatedly elsewhere, but they bear a brief recap because they weigh heavily in

favor of the plaintiffs. The case involves General Motors's right to change the health care plans of 84,000 retirees. The case involves roughly 34,000 salaried employees who retired in the due course of their General Motors careers. They are the so-called "general retirees." From 1974 to 1988, General Motors offered early retirement incentive packages, and roughly 50,000 employees took early retirement at the inducement of General Motors. They are the so-called "early retirees." Both types of retirees received a variety of information from General Motors regarding employee health insurance.

A quick discussion of the particulars of the written materials General Motors distributed is a necessary predicate for the analysis that follows. The factual recitation will show that General Motors repeatedly promised retirees lifetime health care, in a variety of written materials, and only occasionally included a reservation of its right to change retiree benefits. Among the primary sources of information were booklets entitled "Highlights of Your GM Benefits" ("Your GM Benefits") and "The General Motors Insurance Program for Salaried Employees" ("General Motors Insurance"). All eight of the "Your GM Benefits" and "General Motors Insurance" booklets promised lifetime health benefits at the company's expense for salaried General Motors employees and their spouses, and only four contained any reservation of General Motors's rights to amend the agreement. According to Beach Hall, General Motors's director of health care plans, "Your GM Benefits" booklets were distributed to active salaried employees and published in 1966, 1974, 1977, 1980, and 1985. "General Motors Insurance" booklets also were distributed to active salaried employees and published in 1965, 1968, and 1971. "General Motors Insurance" booklets included a promise that "GM will pay" the health insurance costs of retirees but also noted that "GM reserves the right to modify, revoke, suspend, terminate, or change the Program." "Your GM Benefits" promised health care "at GM's expense for your lifetime"

but only the 1985 edition carried any disclaimer or reservation of rights. Therefore, from 1974 to 1985 General Motors distributed employee booklets that promised free lifetime health care and contained no reservation of rights.

General Motors also published "Your Benefits in Retirement" brochures. New versions were issued in 1977, 1980, and 1985. "Your Benefits in Retirement" promised that "[y]our basic health care coverages will be provided at GM's expense for your lifetime," but also noted that "GM health care coverages . . . are subject to change in the future." In a sworn declaration, Hall wrote that the 1977 and 1985 booklets were given to salaried retirees. He did not indicate to whom the 1980 books were distributed. There was some indication that "Your Benefits in Retirement" went to active employees, but the record provides no definitive answer. This would have remained a question for the district court to answer on remand. If General Motors's Hall is correct in saying that the booklets were given to employees after they retired, though, the booklets could not have entered the calculus of the employees' decision to retire.

General Motors contracted with Metropolitan Life and Blue Cross and Blue Shield to provide insurance. During the period from 1964 to 1985 when General Motors contracted with outside insurance companies, employees received certificates of insurance from the insurers. It is not clear from the record before us whether the Metropolitan Life group insurance certificates provided lifetime health care at no cost with no reservation of rights, as plaintiffs claim. Another source of information regarding health care coverage were personal benefit summaries. These summaries came out between the late 1970s and 1985 and promised health care benefits "for your lifetime."

In 1985, General Motors became self insured. At that time, General Motors created the "General Motors Health Care Insurance Program for Salaried Employees," the

"Draft Plan." According to the "Draft Plan," "[t]he Corporation shall contribute the full premium or subscription charge for health care coverages . . . ." if "suitable arrangements for such continuation can be made with the carrier(s)." It is not clear from the record before us whether the "Draft Plan" was distributed to employees or retirees. In *Sprague I* [1] the district court referred to the "Draft Plan" as an "underlying plan document[ ]," *Sprague v. General Motors*, 768 F.Supp. 605, 610 (E.D. Mich. 1991), but General Motors's Hall, in apparent reference to the "Draft Plan," said in a deposition that employees had not received it or been informed of its existence. The question of the status of the "Draft Plan" should have been clarified on remand.

Finally, many early retirees signed "statements of acceptance" in which they acknowledged that they had reviewed the benefits available to them in accepting the offer of early retirement. The statements of acceptance that the early retirees signed generally came in either short or long forms, and the district court delineated subclasses among the early retiree class accordingly. The four subclasses were: "(1) those who signed 'long form' statements of acceptance; (2) those who signed 'short form' statements of acceptance; (3) those who signed 'statements of intent' to retire; and (4) those for whom no such documents can be found." *Sprague v. General Motors Corp.*, 804 F.Supp. 931, 933 (E.D. Mich. 1992). In addition, the early retirees received other written and oral representations from General Motors personnel. In *Sprague II*, the district court summarized these communications nicely. *Sprague v. General Motors Corp.*, 843

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[1] For the sake of convenience, I have adopted the same numbering system as that used by the en banc majority for the various lower-court *Sprague* opinions: *Sprague v. General Motors Corp.*, 768 F.Supp. 605 (E.D. Mich. 1991) (*"Sprague I"*); *Sprague v. General Motors Corp.*, 843 F.Supp. 266 (E.D. Mich. 1994) (*"Sprague II"*); *Sprague v. General Motors Corp.*, 857 F.Supp. 1182 (E.D. Mich. 1994) (*"Sprague III"*).

F.Supp. 266, 308-17 (E.D. Mich. 1994). The written formulations of General Motors's various promises to the early retirees contained the following descriptions of lifetime health care: "Fully Paid by GM," "paid for by the Corporation for life," "continued at the corporation's expense," "a Corporation paid basis," "Corporation continues to pay full contribution for the retiree, spouse and eligible dependents," "GM paying the full cost," and "at no cost to retiree."

There are several issues in this case—vested rights, estoppel, class certification, fiduciary duty—but the underlying question is clear: Do the retirees have a right to the lifetime free health care General Motors promised them or can General Motors renege on its promise? In finding for General Motors, the en banc majority determined that General Motors was not legally bound by its promise. General Motors has profited from distributing a welter of contradictory materials on its health coverage. In light of General Motors's obscurantism, though, it seems paradoxical that General Motors would have some claims dismissed and win others at the summary judgment stage. At the very least, plaintiffs should have the benefit of a trial on some issues to unravel the web of misinformation General Motors has woven. Instead, General Motors profits from having a salaried workforce that operated under the assumption it would receive lifetime health care. When the bill came due, though, General Motors was allowed to walk away.

To follow the en banc majority's decision, it is heads, General Motors wins; tails, the employees lose. I disagree with this outcome, and believe the district court's final judgment should be affirmed in part and reversed and remanded in part. As I will show, a district court could find that general retirees who retired between 1974 and 1985 did have a vested right to benefits based on the unambiguous representations of General Motors. The district court correctly found that early retirees did make a binding, bilateral contract, enforceable under federal com-

mon law, for lifetime health care when they retired from General Motors. The district court could find that all the General Motors retirees did justifiably rely on the company's promises and therefore have an estoppel-based action. The district court properly granted class certification to the early retirees and should have had the opportunity to take a fresh look at class cetrification for the general retirees.[2] Finally, the district court incorrectly found that General Motors had no fiduciary duty and should have reconsidered that decision on remand.

I. Vested Rights

A. General Retirees

General Motors repeatedly promised its retirees health care "at GM's expense" and constantly touted "improvements" in its health plan, yet it contends that it did not create a vested right to health care. The en banc majority agreed, finding that most of the summary plan descriptions unambiguously reserved General Motors's right to amend the benefits. Under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, health insurance is considered a "welfare" benefit as opposed to a "pension" benefit. 29 U.S.C. § 1002(1) & (2)(A). It is true under ERISA that employees do not automatically have a vested right to welfare benefits, *In re White Farm Equip. Co.*, 788 F.2d 1186, 1192-93 (6th Cir. 1986), but it is equally true that a company can create vested rights to such benefits. *Id.* at 1193. A vested right is created by "agreement or by private design." *Id.*

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[2] For the reasons enumerated above, I would find in favor of the named plaintiffs if class certification were denied. Judge Merritt, in concurring in part and dissenting in part, calls for a remand for reconsideration of the claims of the early retiree named plaintiffs. *See supra* at 408. I believe the general retirees deserve their day in court as well. It is inconceivable to me that none of the 114 named plaintiffs have stated a claim worthy of surviving dismissal.

General Motors has created a vested right to health care through its written promises. I, like the en banc majority, find no ambiguity in much of the written material, but I do so in favor of the retirees. The steps to that conclusion are easily taken. The first question is whether the "Your GM Benefits" and "General Motors Insurance" booklets were summary plan descriptions as defined by 29 U.S.C. § 1022. If so, the focus shifts to determining what should govern when the summary plan description differs from the plan documents.

The en banc majority acknowledges that General Motors's summary booklets were summary plan descriptions. *See supra* at 400-01. The en banc majority also argues that summary plan descriptions, as a creation of ERISA, were not required until 1977. *See supra* at 400-01. It therefore considers only the post-1977 booklets to be summary plan descriptions. *See supra* at 400-01. The en banc majority's interpretation conflicts with General Motors's characterization of the booklets. Beach Hall, General Motors's director of health care plans, stated in a sworn declaration: "Although General Motors determined that it was not required to meet ERISA's formal requirements for SPDs until November 1977, it replaced the previous summary booklets with 'Highlights of Your GM Benefits' in 1974, . . . Such booklets have served as the summary plan description." In light of the way General Motors seemed to treat the 1974 booklet as a summary plan description, the district court should determine the ERISA status of the 1974 book on remand. I will base my analysis on the assumption that the post-1974 summary booklets are summary plan descriptions.

General Motors's summary plan descriptions suffer from either the internal inconsistency of contradictory terms or the external inconsistency of conflict with underlying formal plan documents. In some of the summary plan descriptions there is no internal ambiguity—the plan guarantees lifetime health care with no disclaimer. This is true

of the 1974, 1977, and 1980 "Your GM Benefits" brochures. These summary plan descriptions, however, are at odds with the underlying plan documents, which do include a reservation of rights. In *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988), this Court enunciated a principle for dealing with such discrepancies: "This Circuit has decided that statements in a summary plan are binding and if such statements conflict with those in the plan itself, the summary shall govern." *Id.* at 136. The *Edwards* principle governs pension plans and welfare plans.

From 1974 to 1985 the summary plan descriptions contained no reservation of rights and did carry a guarantee of lifetime health care. The en banc majority notes that "*Edwards* does not apply to silence," and argues that the summaries were silent on General Motors's right to change the plan. *Supra* at 401. This ignores, however, the plain import of statements such as "at GM's expense for your lifetime." Just because the summary does not speak to General Motors's rights in the same language used in the plan does not mean the summaries are silent on the issue. Noting that benefits are "for your lifetime" is tantamount to saying that General Motors cannot change the plan. In addition, the en banc majority contends that "[n]either the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." *Supra* at 402. Again, lifetime rights are vested rights.

It is true that from 1977 to 1985 "Your Benefits in Retirement" did include reservations of rights clauses. It bears noting, though, that these clauses were the rather tepid statement that benefits "have been changed from time to time through the years and are subject to change in the future." This clause is particularly problematic because General Motors always trumpeted its changes as improvements. The court in *Sprague II* quoted a member

of General Motors's legal department telling General Motors staff: "GM is not in sound position to win the probable lawsuit filed by retirees. Program booklets and previous pre-retirement interviews have not stressed the possibility of 'negative' program changes." 843 F.Supp. at 305. Regardless of whether the disclaimers in the "Your Benefits in Retirement" brochures act as an effective reservation of rights, the effects of such putative disclaimers are nugatory. Benefits given in documents distributed prior to, and for the duration of, retirement, cannot be rescinded in post-retirement documents. *See Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368, 1378 (6th Cir. 1994) (stating that once employee is entitled to benefit, it would be "illusory" to divest benefit retroactively) (internal quotation marks omitted); *Gentile v. Youngstown Steel Door Co.*, 1986 WL 17464 at *5 (6th Cir. Aug. 25, 1986) (stating that court "must focus on the plan documents which were distributed to the retirees while they were active employees").

In sum, the district court should have had an opportunity on remand to determine whether the 1974 "Your GM Benefits" booklet was a summary plan document and whether the "Your Benefits in Retirement," in particular the 1980 edition, were distributed only to retirees. If those questions were answered affirmatively, there would be an eleven-year window from 1974 to 1985 in which the summary plan documents, which govern under *Edwards*, contained an unambiguous promise of lifetime health care. For general retirees who retired while these summary plan descriptions were in effect, this uncontradicted promise would be sufficient to vest their rights to lifetime health care. They deserved a chance to prove that in the district court.

F. Early Retirees

The early retirees base their claims for vested rights to health care on the bilateral contracts they signed with

General Motors. The en banc majority determined that such extra-plan documents carried no weight under ERISA. This Court, however, had left the question of the validity of extra-plan documents open in *Musto v. American Gen. Corp.*, 861 F.2d 897 (6th Cir. 1988). In *Musto* this Court noted: "Whether, under ERISA, employees can ever obtain vested rights in welfare plan benefits on the strength of written representations outside the official plan document is a question we need not decide." *Id.* at 907. I believe the answer should be in the affirmative in this case.

The early retirees' claims are founded on the early retirement agreements they signed and other representations General Motors made to them at retirement. These agreements, they argue, constitute binding, bilateral contracts with General Motors for lifetime health care—a bargained-for agreement. The early retirees not only gave up their jobs, but some also surrendered the right to bring causes of action, including civil rights and age discrimination claims, against the company. They argue that this mutual consideration entitles them to bring a breach of bilateral contract claim. Typically a breach of contract claim falls under state law, and ERISA preempts state law. 29 U.S.C. § 1144(a). Preemption need not sound the death knell for a contract-based claim, though. As the district court recognized, plaintiffs can make claims beyond state law.

The district court in *Sprague II* found the early retirement agreements for early retiree subclasses (1) and (2) "enforceable under ERISA as independent bilateral contracts, or as modifications of GM's health care benefit plan." 843 F.Supp. at 299. In *Sprague II*, the district court also quoted Justice Brennan: " 'The legislative history demonstrates that Congress intended federal courts to develop federal common law in fashioning' relief under ERISA." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 156, 105 S.Ct. 3085, 3097, 87

L.Ed.2d 96 (1985) (Brennan, J., concurring), quoted in 843 F.Supp. at 301. These contracts are best enforced under federal common law.

Given that the contracts are enforceable under federal common law, the focus then turns to divining the contracts' terms. The district court in *Sprague II* argued that the agreements were not fully integrated, which opens the door to extrinsic evidence. 843 F.Supp. at 301. This extrinsic evidence, as discussed above, includes written materials showing that General Motors personnel used almost virtually every possible permutation of the words "free lifetime health care" when presenting future benefits to employees. The district court in *Sprague II* found enforceable contracts for the subclass (1) and (2) early retirees, 843 F.Supp. at 299, and the district court noted in its Final Judgment that the subclass (4) early retirees also had enforceable contracts. That judgment should have been affirmed.

II. Estoppel

The General Motors retirees are prime candidates for bringing an estoppel claim. General Motors clearly wanted employees, potential employees, retirees, and potential retirees to rely on its boastful presentations of its benefit programs. The 1966 "Your GM Benefits" booklets provides an example of the sort of representations General Motors was making: "Today's General Motors benefits are an important factor in making your life more enjoyable and your future more secure." The brochures in question here undoubtedly were helpful in the recruitment and retention of personnel, and, when the time came, the inducement of certain employees to take early retirement. Yet, when retirees claim that they relied on these representatio s, General Motors calls such reliance unjustifiable.

The en banc majority acknowledges that estoppel can be a viable theory in ERISA cases but makes a misstep in dismissing the early retirees' estoppel claim because there

was no reasonable reliance. *See supra* at 400-01. The district court in *Sprague III* held that the early retirees should prevail on their promissory and equitable estoppel claims. *Sprague v. General Motors Corp.*, 857 F.Supp. 1182, 1192 (E.D. Mich. 1994). The court noted: "I also find that this reliance was reasonable and justifiable. GM led the early retirees to reasonably believe that they were receiving a special deal: notwithstanding language in the plan documents to the contrary, the early retirees would receive lifetime health care benefits at no cost to them." *Id.* at 1191. Reliance on repeated assurances of free lifetime health care, sometimes couched with timid caveats, from one of the largest corporations in the world was not justifiable in the en banc majority's view. The en banc majority erred in this determination, and the district court should have been affirmed in finding an estoppel cause of action for the early retirees.

In *Sprague III*, the district court held that any reliance on the part of the general retirees "was inherently unreasonable and unjustified." 857 F.Supp. at 1189. The en banc majority, finding the district court's determination that there were no misleading representations to general retirees "unassailable," does not even deal with the general retirees' estoppel claims. Why could the general retirees not reasonably rely on materials that repeatedly promised them lifetime health care and only occasionally included a reservation of rights? As I have shown, General Motors failed to reserve its rights in the "Your GM Benefits" brochures in effect from 1974 to 1985. In addition, when General Motors did reserve its rights, this reservation was less than clear, particularly when considered in light of General Motor's incessant touting of "improvements" to the plan and General Motors's boasting about "one of the finest and most comprehensive employe (sic) benefit packages in the industry." The issue of the reasonableness of the general retirees' reliance should have been remanded to the district court. The reliance of those who retired

from 1974 to 1985 appears eminently justifiable. For other general retirees, there were sufficient representations on the part of General Motors to create a question of material fact as to whether a person justifiably could rely on them.

III. Class Certification

Strangely, although the en banc majority is willing to paper over differences among plaintiffs in other contexts, it suddenly finds that the plaintiff group is riven with fissures when it comes to class certification. The certification of two classes, the early retirees and general retirees, is at issue.

The en banc majority denies class certification to the general retirees on the grounds that they cannot prevail on the merits. As I have shown above, the general retirees could win on the merits, which begs a fresh inspection of their class certification. The en banc majority acknowledges that the general retirees "may have been better-suited for class treatment than the early retirees," and "base their claims on . . . documents common to all salaried employees." *Supra* at 397. The generals fulfill the numerosity, commonality, typicality, and adequacy of representation requirements of Fed.R.Civ.P. 23(a). In addition, the general retirees meet the requirements of Fed.R.Civ.P. 23(b)(3) because common questions of law and fact predominate and a class action is superior to individual actions. The question of class certification for the general retirees should be remanded to the district court.

Regarding the early retirees, the en banc majority found that the district court abused its discretion in certifying a class with four subclasses. It found that, in light of their claims of bilateral contract and estoppel, the early retirees lacked the commonality and typicality requisite for class certification. I disagree with the conclusion that the district court abused its discretion when it certified a class in

which all the members were seeking exactly the same remedy and doing so under the same legal theories.

This Court's recent decision in *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877 (6th Cir. 1997) supports the district court's decision to certify a class of early retirees. *Bittinger* dealt with a class of 1,200 retired employees whose lifetime insurance benefits were terminated when the collective bargaining agreement expired. *Id.* at 879. They were offered partially funded life and health insurance coverage if they agreed to sign releases of claims against the company. *Id.* Some, but not all, of the class members signed releases. *Id.* The retirees subsequently brought a class action under ERISA claiming that their "original collective bargaining agreement guaranteed them lifetime, fully-funded benefits." *Id.* at 884. The court found that "[t]his common question is all that is required by the rule." *Id.* The early retirees share the common question of what GM pomised them in order to induce them to retire. To the extent there are differences, the district court could have created subclasses, as it had attempted to do. As to typicality, the Bittinger class shared many characteristics with the Sprague early retirees. With the Bittinger class, there were numerous dates of retirement, various oral representations to members, and some members who had signed releases. *Id.* Nonetheless, the court found "[t]hat the evidence varies from plaintiff to plaintiff would not affect this basic claim." *Id.* The same is true of the Sprague class of early retirees. To the extent there were differences in the early retiree class, the district court accounted for the variations by creating four *Sprague* subclasses. There was no abuse of discretion in doing so. No class that includes thousands of plaintiffs will be perfectly homogeneous, and, as the Fifth Circuit noted in *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993): "The test for typicality, like commonality, is not demanding." The district court did not abuse its discretion in certifying the early retirees and should have been affirmed.

IV. Fiduciary Duty

The en banc majority limits its discussion of fiduciary duty to the early retirees, and acknowledges that "GM may have acted in a fiduciary capacity when it explained its retirement program to the early retirees." *Supra* at 405. The en banc majority then finds, however, that General Motors did not breach this duty. "In the first place, GM never told the early retirees that their health care benefits would be fully paid or vested upon retirement. What GM told many of them, rather, was that their coverage was to be paid by GM for their lifetimes." *Supra* at 405. In essence, the en banc majority argues that even though General Motors promised free lifetime health care and later forced retirees to pay part of the bill, the initial promise was not misleading.

I disagree, and plaintiffs, both general and early retirees, should have a chance to argue their breach of fiduciary duty claims. It is true that "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990). It is also true, however, that "a fiduciary may not materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988). Had General Motors never created a right to free lifetime health care, it would be free to amend or even terminate the insurance for retirees. When an employer establishes a right to lifetime health care benefits through vesting, as General Motors has done, the employer loses the unfettered freedom to amend or terminate the plan. General Motors has violated its fiduciary duty, and the district court in *Sprague I* erred in dismissing plaintiffs' fiduciary duty claim.

Conclusion

This is a classic case of corporate shortsightedness. When General Motors was flush with cash and health care

costs were low, it was easy to promise employees and retirees lifetime health care. Later, when General Motors was trying to sweeten the pot for early retirees, health care was another incentive to get employees off General Motors's groaning payroll. Of course, many of the executives who promised lifetime health care to early and general retirees are probably long since gone themselves. Rather than pay off those perhaps ill-considered promises, it is easier for the current regime to say those promises never were made. There is the tricky little matter of the paper trail of written assurances of lifetime health care, but General Motors, with the en banc majority's assistance, has managed to escape the ramifications of its now-regretted largesse.

The plaintiff class's claims for lifetime health care lie in shambles despite General Motors's repeated assurances of just coverage. As I survey the wreckage of these claims, I am reminded that ERISA's underlying purpose is "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). ERISA is not a cure-all for disputes between companies and employees over welfare and pension plans, but this case provides a role for ERISA. The en banc majority opinion validates General Motors's decision to institute premiums and raise deductibles on retirees' health insurance, but the decision bestows upon General Motors the freedom to eliminate health care coverage completely. Seemingly, any reservation of rights, no matter how weakly worded or unconnected to the grant of rights, will inure a company from having to live up to its obligations in the future. Ultimately, the en banc majority puts a new twist on an old aphorism, and what is good for General Motors is not good for the country but rather is bad for its retirees. I therefore respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 94-1896 to 94-1898 and 94-1937

ROBERT D. SPRAGUE, *et al.*,
Plaintiffs-Appellees,
Cross-Appellants,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellant,
- Cross-Appellee.

Argued Aug. 3, 1996
Decided Aug. 14, 1996

Before LIVELY, MARTIN and DAUGHTREY, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

A putative plaintiff class of more than 84,000 non-union retirees [1] of the General Motors Corporation filed suit under the Employee Retirement Income Security Act of

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[1] The putative class included approximately 34,000 general retirees and approximately 50,000 early retirees. General retirees are individuals who were entitled to retire without General Motors' consent either at age sixty-five or after thirty years' service with the company. Early retirees are individuals who participated in one of the early retirement programs offered by General Motors between 1974 and 1988 which required that both the company and the employee consent to the retirement.

1974, 29 U.S.C. §§ 1001, *et seq.*, seeking a judgment requiring General Motors to furnish them with basic health care coverage at no cost for their lifetimes and the lifetimes of their surviving spouses. In their complaint, the plaintiffs alleged that General Motors violated the terms of its health care plan and the Employee Retirement Income Security Act by reducing or eliminating certain health care coverages beginning in 1988. The plaintiffs also claimed that the changes constituted a breach of General Motors' fiduciary duties under the Employee Retirement Income Security Act. The plaintiffs asserted separate causes of action arising from the same changes based on breach of contract and equitable or promissory estoppel. In addition, the plaintiffs alleged that General Motors violated the requirements of the Employee Retirement Income Security Act by failing to maintain its health care plan pursuant to a written instrument; refusing or failing to supply requested information; and failing to comply with requirements for summary plan descriptions.

In a series of opinions and orders, the district court: (1) held that General Motors unambiguously reserved to itself the right to modify health care coverages, and thus did not agree in the general plan documents to provide salaried retirees with vested health care benefits; (2) dismissed plaintiffs' claim that the 1988 changes constituted a breach of General Motors' fiduciary duties under the Employee Retirement Income Security Act; (3) certified a class of early retirees; (4) held that the class of early retirees was not entitled to a jury trial; (5) held that General Motors bilaterally contracted to provide vested health care benefits to the early retirees; (6) held that General Motors was estopped from modifying health benefits as to the early retirees but not as to the general retirees; and (7) granted limited injunctive relief prohibiting General Motors from implementing some of the contested modifications during the pendency of this appeal.

Final judgment in the case was rendered on August 4, 1994, and the parties filed timely notices of appeal. For

the reasons set forth below, we AFFIRM the district court's rulings in part, REVERSE the district court's rulings in part, and REMAND for further proceedings consistent with this opinion.

I.

The background of this case is complex, and has been set forth in *Sprague v. General Motors Corp.*, 768 F.Supp. 605 (E.D. Mich. 1991) (*Sprague I*), *Sprague v. General Motors Corp.*, 804 F.Supp. 931 (E.D. Mich. 1992) (*Sprague II*), *Sprague v. General Motors Corp.*, 823 F. Supp. 442 (E.D. Mich. 1993) (*Sprague III*), *Sprague v. General Motors Corp.*, 843 F.Supp. 266 (E.D. Mich. 1994) (*Sprague IV*), and *Sprague v. General Motors Corp.*, 857 F.Supp. 1182 (E.D. Mich. 1994) (*Sprague V*). We repeat the district court's recitation of those facts necessary to an understanding of this appeal.

In 1964, General Motors began to pay the full cost of basic hospital, medical, and surgical insurance for salaried retirees. This benefit was extended to most surviving spouses in 1968. General Motors also offered salaried retirees and surviving spouses an additional layer of coverage under its Comprehensive Medical Expense Insurance Program.[2] General Motors provided these coverages through arrangements with various private insurance companies. Some of the arrangements were memorialized in written contracts of insurance between the insurance carrier and General Motors, while others were not. All carriers provided participants with certificates of insurance detailing the terms of coverage.[3]

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[2] When General Motors became self-insured in 1985, this program became the Comprehensive Medical Expense Program. At all times, participants were required to pay co-payments, deductibles, and a portion of the insurance premiums.

[3] Until 1985, General Motors' formal plan was set forth in insurance policies and certificates of insurance issued by the Metropolitan Life Insurance Company and Blue Cross and Blue Shield. Those documents made statements to the effect that benefits would automatically cease upon discontinuance of the policy, and that General

In 1985, General Motors became self-insured and the use of insurance certificates was discontinued. Instead, General Motors drafted a document entitled "The General Motors Health Care Insurance Program for Salaried Employees." This document, together with subsequent writings announcing coverage changes, described General Motors' health care coverage plan post-1985.

Over the years, General Motors communicated its health care coverage plan to employees and retirees by means of summary booklets. Prior to 1974, General Motors periodically published a booklet entitled "The GM Insurance Program For Salaried Employees." With the enactment of the Employee Retirement Income Security Act in 1974, the method of supplying participants with plan summaries changed. Thereafter, General Motors published a plan summary entitled "Highlights of Your GM Benefits." In addition, when the Employee Retirement Income Security Act began requiring summary plan descriptions in 1977, General Motors began to publish a booklet entitled "Your Benefits in Retirement." This booklet apparently served as and continues to serve as the summary plan description for benefits provided to salaried employees.

Several summary booklets distributed to General Motors' salaried employees and retirees contained statements informing participants that General Motors would pay the full cost of basic health care coverage during their retirement.[4] Most booklets also contained statements,

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Motors could discontinue the policy by failing to pay the premium or by giving written notice.

[4] The 1968 and 1971 booklets both stated: "If you retire . . . and are eligible to receive retirement benefits under the provisions of the GM Retirement Program for Salaried Employees, you may keep your basic hospital, surgical and medical expense coverages in effect. . . . GM will pay the full monthly premium or subscription charge for such coverage." A 1974 booklet stated: "Hospital-Medical Coverages: Your basic coverages will be provided at Corporation expense for your lifetime (except for voluntary retirement between ages 55 and 60 when combined years of age and credited

however, warning participants that their benefits were subject to change. With the exeception of the 1966 and 1974 summary booklets, and the 1977 and 1980 versions of "Your GM Benefits," each summary contained a provision arguably reserving General Motors' right to modify or terminate its health insurance program.[5] In addition to these booklets, General Motors distributed various documents to individuals who retired early under various special early retirement programs offered by the company beginning in 1974.

In 1974, General Motors instituted a program of Special Early Retirement with enhanced benefits for pension-eligible employees as an inducement for their departure from the company. The company also offered other types of early retirement packages over the years. Many early retirees signed statements of acceptance evidencing their agreement to accept General Motors' offer of early retire-

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service total less than 85). Dental coverages cannot be continued." The 1977 version of "Your Benefits in Retirement" stated: "Are My Health Care Coverages Continued While I Am Retired? Your basic health care coverages will be provided at GM's expense for your lifetime. . . . General Motors pays the full cost of any basic health care coverages that are continued for most retired employees and for eligible surviving spouses and children of deceased retirees." The district court found that similar or identical statements were contained in many other booklets distributed by General Motors or its insurance carriers over the years. *See Sprague I*, 768 F.Supp. at 608.

[5] The booklets contained a provision similar to one of the following:

> GM reserves the right to modify, revoke, suspend, terminate, or change the Program, in whole or in part, at any time.
>
> GM health care coverages have been changed from time to time through the years and are subject to change in the future.
>
> The Corporation reserves the right to amend, modify, suspend, or terminate its employee benefit plans or programs by action of its Board of Directors.
>
> GM reserves the right to amend, change or terminate the plans and programs described in this booklet.

ment. In some of these statements, the early retirees affirmed that they had reviewed the applicable benefits and accepted them. In exchange, the retirees gave up their jobs and many promised to release General Motors from liability for certain causes of action potentially connected with their early departures. Prior to signing these forms, many early retirees were given benefit summaries describing the health care benefits they would receive during retirement.

In 1987, General Motors announced modifications in its health care program, to become effective in 1988 for salaried employees, retirees and surviving spouses. Under the modified program, participants who opt for traditional fee-for-service coverage are required to pay an annual $200 individual or $250 family deductible for basic coverage. After the annual deductible is met, participants are responsible for a 20% co-payment for most basic services, until the annual out-of-pocket expense equals a maximum of $500. Combined, the deductibles and co-payments require participants to pay an annual maximum of $750 in medical bills that were previously paid by General Motors. In addition, several other changes were made to General Motors' health care program at the same time. For example, vision and hearing aid coverages were eliminated and then later made available subject to co-payments and deductibles. In addition, Comprehensive Medical Expense Program deductibles were increased, and General Motors increased the monthly contribution required of Comprehensive Medical Expense Program participants. General Motors also instituted several benefit increases. These changes are the basis of the plaintiffs' suit.

II.

Turning to the merits of this appeal, we first address the parties' claims that the district court erred in its class certification decisions. In *Sprague I*, the district court held that General Motors' plan documents unambiguously

set forth the company's right to modify health care coverages, and did not vest in the employees the right to any particular level of health care benefits upon retirement. The court left open the possibility, however, that General Motors may have contracted bilaterally to provide vested benefits to early retirees, and subsequently certified the 50,000 early retirees as a class for a bench trial on that issue.[6] Having concluded that the 34,000 general retirees had no claim to vested health care benefits, the district court never addressed their motion for class certification.

On appeal, the plaintiffs contend that the class should have included not only the early retirees, but the general retirees and their surviving spouses as well. The plaintiffs claim that: the general retirees are covered by the same class-wide allegations as the early retirees; all but one of the claims were raised on behalf of both general and early retirees; the conduct complained of is the same; and the relief sought is identical. Therefore, the plaintiffs claim that the general retirees, no less than the early retirees, satisfied the requirements of Fed. R. Civ. P. 23. General Motors, in turn, contests the district court's certification of the early retirees on the ground that Rule 23's commonality and typicality requirements were not met. General Motors claims that there was no single written or oral source of information common to all class members because there were tens of thousands of retirees who worked in dozens of different locations and retired over a fourteen-year period. Moreover, General Motors argues that the class members had different amounts of information, different sources of information, and different individual understandings about the meaning of those communica-

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[6] On November 4, 1991, the district court issued a class certification order establishing four subclasses of early retirees: (1) those who signed "long form" statements of acceptance; (2) those who signed "short form" statements of acceptance; (3) those who signed "statements of intent" to retire; and (4) those for whom no such documents could be found. *See Sprague II*, 804 F.Supp. at 923.

tions. Because the communications varied according to the time of an individual's retirement, his or her plant location, and the division involved, General Motors claims that the plaintiffs are not able to demonstrate commonality or typicality.

A district court's decision with regard to class certification is reviewed for an abuse of discretion. *Mayer v. Mylod*, 988 F.2d 635, 640 (6th Cir. 1993). District courts have broad discretion over class certification controversies, but must "conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met before certifying a class." *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996). Under Fed. R. Civ. P. 23(a), four conditions must be met to file a class action suit: (1) the joinder of members must be impracticable; (2) questions of law or fact must be common to the class; (3) the representatives of the class must be typical members of the class; and (4) the representatives must fairly represent the interests of the class. Under Rule 23(b), one of three conditions must be met to maintain a suit as a class action: (1) there must be a risk of either incompatible standards of conduct or a risk that interests of prospective class members would be impaired by an adjudication of others' claims; (2) the party opposing the class has acted toward the members in a uniform way; or (3) issues common to the class predominate over issues which are not common to the class and the best method of trying the suit is as a class action. *See Mayer*, 988 F.2d at 640.

A recent Fifth Circuit case expressly evaluated the propriety of class certification in the context of an Employee Retirement Income Security Act action. In *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993), the court reversed a district court's refusal to certify a class where the potential class was covered by four different pension plans. The court stated that the commonality threshold for class certification is not high, and identified

an issue common to the class: whether Penney's alleged overestimation of social security benefits violated the Employee Retirement Income Security Act's nonforfeiture provisions. *Id.* at 1106. The court stated:

> Framed in this manner, Forbush has met the commonality requirement, despite the fact that four different pension plans are involved. The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is "at least one issue whose resolution will affect all or a significant number of the putative class members." For this reason, "[t]he threshold of 'commonality' is not high." Although the subsequent determinations of individual awards are likely to be far less mechanical than Forbush suggests, the necessity for for even somewhat complex individual calculations does not supply a basis for concluding that Forbush has not met the commonality requirement.

Id. (internal citations omitted).

While this Court recently stressed the importance of the commonality inquiry, we emphasized at the same time that the inquiry "is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class." *In re American Medical Sys., Inc.*, 75 F.3d at 1080 (citation omitted). Where there is such a common issue, we have routinely permitted class action suits in the Employee Retirement Income Security Act context. *See e.g., In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986) (involving claims by a group of retirees for recovery and reinstatement of allegedly nonterminable welfare benefits where the retirees were recipients of various descriptive brochures); *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993) (action by group of retired employees protesting attempted termination of health insurance benefits involving different plan booklets, handbooks, outlines, revised plan booklets, insurance certificates, and verbal assur-

ances). In this case, the early retirees have several issues in common, including the predominant one of whether General Motors offered certain benefits to induce them to retire early. In addition to asserting the same rights asserted by the general retirees founded upon the basic plan, the early retirees contend that the early retirement offer and their acceptance of it formed a separate binding contract. We find that the early retirees satisfy the commonality requirement of Rule 23(a)(2).

General Motors also attacks the district court's certification of the early retirees as a class on the ground that the plaintiffs' claims do not satisfy Rule 23(a)(3). The test for typicality is whether a "sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *In re American Medical Sys., Inc.*, 75 F.3d at 1082 (citations omitted). In *Forbush*, the Fifth Circuit noted that "[t]he test for typicality, like commonality, is not demanding." 994 F.2d at 1106. The court stated:

> It is true that much of the putative class is covered by plans other than the one applicable to Forbush, but Forbush has framed her challenge in terms of Penney's general practice of overestimating social security benefits. Her claim is therefore typical and thus provides no basis for suspecting that she will not adequately represent the interests of the class.

Id.

General Motors cites *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993), in an effort to show that the different groups of retirees who received different representations should not be grouped together:

> Appellants have not provided any evidence other than speculation that any alleged communications by the City or the Funds to the fire, laborer, or municipal annuitants were the same as those made to

> the police. Even among the police, the record indicates that some annuitants heard these communications at retirement seminars, some read a booklet, some heard through word of mouth, and many simply had a general impression of the benefits to which they were allegedly entitled. Some were ignorant of any alleged promises.

Id. General Motors omits the immediately following portion of the opinion, however:

> Because the RCPA does not include individuals from all of the fund groups and there is no indication that each of these groups was treated identically by the City or by its respective fund, its claims cannot be deemed typical of the entire proposed class. The RCPA is composed only of retired police offiicers, and it simply cannot be assumed, especially because these communications were for the most part verbal, that the claims of these police officers "have the same essential characteristics as the claims of the class at large". . . . [T]he putative class has not demonstrated that the police annuitants' claims have the same essential characteristics as the claims of the class at large. . . . Moreover, the asserted estoppel claims depend on the particular nature of the communications allegedly made in a particular instance and on each annuitant's reliance on that particular communication.

Id. (internal citations omitted). The Seventh Circuit thus found typicality lacking because the police retirees were not representative of retirees from other government branches and seemed not to fully represent the possible claims within even the police retiree group. By contrast, the class representatives in this case appear to embody the spectrum of information received by the class as a whole. This case is more analogous to *Forbush,* where the court concluded that, although much of the putative class was covered by plans other than the one applicable to the class representative, the representative framed her challenge in

terms of the defendant's "general practice of overestimating social security benefits," thereby satisfying the typicality requirement of Rule 23(a)(3). *Forbush,* 994 F.2d at 1106. Although the early retirees in the class certified by the district court retired at various times and received different information, they attack a system-wide modification by General Motors of their right to benefits and therefore satisfy Rule 23(a)(3).

We hold that the district court did not abuse its discretion in granting class certification to the group of early retirees in this case. The district court will be required, however, to address the general retirees' request for class certification when the case is remanded for the reasons set forth below.

III.

The parties' central arguments on appeal stem from the district court's grant of summary judgment against the general retirees on their claim for vested health care benefits, and its denial of summary judgment against the early retirees. In *Sprague I,* the district court found that General Motors' salaried health care plan contained an unambiguous reservation of the company's right to amend or terminate the plan, 768 F.Supp. at 610, and consequently granted summary judgment against the general retirees on their claim for vested health care benefits. The court denied summary judgment, however, as to the early retirees on this issue, and reserved the question of whether General Motors "bilaterally contracted to provide vested benefits to early retirees" for a later bench trial. 768 F. Supp. at 612. After the bench trial, the court ruled in *Sprague IV* in favor of the early retiree class, holding that the company entered into contracts with its early retirees, assuring them and their surviving spouses that they would receive the same level of health care benefits for their lifetimes at no cost. 843 F.Supp. at 299. The court concluded that the early retirees had a vested right to lifetime health care benefits based on "statements of acceptance"

that they signed and on various written and oral communications provided by General Motors. Although the court recognized that General Motors' benefits descriptions had varied, and that some of the descriptions reserved a right to amend the plan, it concluded that General Motors had promised to provide medical coverage to early retirees for life at no cost. *Id.* at 299, 317.

On appeal, the plaintiffs argue that the district court should have found that the general retirees also had vested rights to lifetime health care benefits. General Motors, by contrast, maintains that its plan documents unambiguously reserved General Motors' right to alter its health care plan, and contends that the district court erred in holding that the early retirees had a vested right to unchanged lifetime health benefits based on statements of acceptance signed by the early retirees and informal communications provided by General Motors.

We review a district court's grant of summary judgment *de novo*. *Pope v. Central States Southeast & Southwest Areas Health and Welfare Fund*, 27 F.3d 211, 212-13 (6th Cir. 1994). As to a district court's decision following a bench trial, we can only reverse the court's findings of fact if they are clearly erroneous. *Boyer*, 986 F.2d at 1003. However, contract interpretation is a question of law subject to *de novo* review. *Id.* A district court's dismissal of claims is also reviewed *de novo*. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1239-40 (6th Cir. 1993).

The Employee Retirement Income Security Act "does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under [the Act], for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, —— U.S. ——, ——, 115 S.Ct. 1223, 1228, 131 L.Ed.2d 94 (1995). The Act also does not establish "minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans."

Id. The absence of a statutory vesting requirement, however, does not mean that a welfare plan will never vest. *International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 301 (6th Cir. 1991), *cert. denied*, 504 U.S. 973, 112 S.Ct. 2941, 119 L.Ed.2d 565 (1992). Although we have declined to construe the Employee Retirement Income Security Act as providing a mandatory point for the vesting of welfare benefits, "it is settled law that an employer and an employee may contract for post-employment welfare benefits." *In re White Farm Equip. Co.*, 788 F.2d at 1191.

In determining whether the parties have contracted for such benefits, a court "must look to the intent of the parties and apply federal common law of contracts to determine whether welfare plan benefits have vested." *Gill v. Moco Thermal Indus., Inc.*, 981 F.2d 858, 860 (6th Cir. 1992). Under the Employee Retirement Income Security Act, an employee benefit plan must be established and maintained pursuant to a "written instrument." 29 U.S.C. § 1102(a)(1). With regard to medical insurance benefits, insurance policies themselves are the "written instruments" required by law. *Musto v. American Gen. Corp.*, 861 F.2d 897, 901 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.E..2d 182 (1989). In ascertaining parties' contractual intent, a court therefore first looks to the "written instrument" which forms the agreement for clear manifestations of intent. *See Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017, 106 S.Ct. 1202, 89 L.Ed.2d 315 (1986).

1. The General Retirees

The plaintiffs in this case have never claimed that the underlying plan documents contained an agreement by General Motors to provide plan participants with vested health care benefits. Instead, they have argued that language included in summary plan descriptions and other

summary documents distributed by General Motors or its insurance carriers over the years constituted an agreement by General Motors to provide salaried retirees and eligible surviving spouses with free health care coverage for life. The district court disagreed with the plaintiffs' contention, and found in *Sprague I* that, although the summary booklets "uniformly contained provisions similar to the following: 'Your basic health care coverages will be provided at GM's expense for your lifetime,' " 768 F.Supp. at 610, "[v]irtually all" of the booklets contained provisions unambiguously reserving General Motors' right to amend the plan. *Id.* at 610-11. The court concluded that only one summary booklet, issued in 1974, did not contain a provision reserving General Motors' right to change the plan, and held that, in light of the fact that "GM employees were generally put on notice of GM's right to modify its health care plan," its failure to reiterate such notice in one booklet was not entitled to great weight. *Id.* at 611, n. 7.

We conclude now that the district court's approach in *Sprague I* was mistaken in several respects. Most importantly, the district court disposed of the general retirees' claims without distinguishing among or thoroughly examining the different policies and summary booklets applicable to the various plaintiffs. The district court must distinguish clearly between informal summary communications and official summary plan descriptions before it can proceed to resolve any conflicting language in the plan documents or to ascertain the parties' intent in the event that plan language is found to be ambiguous.

In *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988), this Court held that, where a summary plan description exists and contains language which conflicts with statements in the underlying plan document, the summary plan description must govern. The Employee Retirement Income Security Act "requires, in no uncertain terms, that the summary plan description be 'accurate' and 'sufficiently comprehensive to reasonably

apprise' plan participants of their rights and obligations under the plan." *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981 (5th Cir. 1991); 29 U.S.C. § 1022(a)(1). Consequently, we reasoned in *Edwards* that "[i]t is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet." 851 F.2d at 136 (citations omitted); *see also Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 140 (4th Cir. 1993) (holding that "representations in a SPD control over inconsistent provisions in an official plan document"); *Hansen*, 940 F.2d at 982 (stating that, like the Sixth and Eleventh Circuits, the Fifth Circuit holds that where there is a conflict between a summary plan description and the terms of a master policy, the summary plan description governs). In this case, the district court failed to recognize and take the *Edwards* principle into account in reaching its decision in *Sprague I*. We believe that the principle enunciated in *Edwards*, a pension plan case, applies equally to welfare plan cases, and therefore extend the *Edwards* rule to the welfare plan context.

Twelve summary booklets were issued between 1965 and 1988. Most, but not all, of the booklets contained a provision to the following effect: "Your basic health care coverages will be provided at GM's expense for your lifetime," and more than one summary booklet failed to contain an express reservation of right provision. Our review of the relevant provisions indicates that not only was such a provision absent in the 1974 version of "Your GM Benefits," but two additional booklets ("Your GM Benefits" published in October of 1977 and August of 1980) contained lifetime language without an express reservation of right.[7] Thus, three of the "Your GM Benefits"

[7] The "Your Benefits in Retirement" booklets distributed in November of 1977 and August of 1980 did contain language stating

booklets distributed to employees between 1974 and 1988, as well as the 1966 "Your GM Benefits" booklet contained no reservation of right language. By contrast, three pre-Employee Retirement Income Security Act booklets (1965, 1968, and 1971) and the 1985 and 1988 summaries contained language to the effect that GM "reserves the right to amend, change or terminate the Plans and Programs described in this booklet."

The district court also failed to distinguish clearly between the effect of the "Your GM Benefits" booklets and the "Your Benefits in Retirement" booklets. Although the district court stated in *Sprague I* that the "Your Benefits in Retirement" booklets published in 1977 and 1980 qualified as summary plan descriptions, 768 F.Supp. at 608, it did not state definitively whether the "Your GM Benefits" booklets published in 1977 and 1980, or the other summary booklets for that matter, qualified as official summary plan descriptions. General Motors admits, however, that "the booklets issued since 1977 have qualified as summary plan descriptions," (Brief for General Motors at 3), and we will proceed on that assumption.

Just as importantly, the district court's factual findings are inconsistent with regard to when certain summary plan descriptions were distributed, and the parties disagree as to whether the "Your Benefits in Retirement" booklets were distributed to employees prior to or after their retirement. General Motors claims that the "Your Benefits in Retirement" booklets were "generally" and "routinely" distributed to active employees prior to their retirement. (Brief for General Motors at 4, 28). The plaintiffs, by contrast, contend that it was not a routine practice to distribute the booklets before retirement, and argue that, on the summary judgment record in *Sprague I*, it was undisputed that the "Your Benefits in Retirement" booklets were distributed to retirees rather than active employ-

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that "GM health care coverages have been changed from time to time through the years and are subject to change in the future."

ees. In *Sprague IV*, the district court concluded that the "Your GM Benefits" booklet was "designed for distribution to active employees" and was "not associated with any early retirement offer," and that many early retirees did not receive a copy of the "Your Benefits in Retirement" booklet "until after they retired, or just before they walked out the door." 843 F.Supp. at 303. It is vital that the district court clearly resolve the issue of whether the "Your Benefits in Retirement" booklet was generally distributed to employees before or after retirement so that it can in turn decide whether individuals retiring under the 1977 and 1980 summary plan descriptions are entitled to vested health care benefits (see discussion below).

The district court also failed to distinguish between the effect of official statutory summary plan descriptions and other general summary booklets distributed over the years. Although the Employee Retirement Income Security Act was passed in 1974, it did not require companies to provide summary plan descriptions until 1977.[8] Therefore, the 1974 "Your GM Benefits" booklet was actually a pre-Employee Retirement Income Security Act summary booklet. However, both the district court and the parties seem to have treated this summary booklet as having the status of an official summary plan description. *See* Brief for Sprague at 7, n. 11 (stating that, "[t]hough the 1974 booklet pre-dated ERISA's SPD requirement, GM's declarant stated that GM prepared this booklet as if the SPD requirement were already in effect"); Amicus Brief for Secretary of Labor at 22 (stating that the 1974 summary "although issued prior to 1977 and not formally an SPD, apparently was distributed by GM to employees before they retired with the intention of summarizing the

[8] A summary plan description is a publication explaining the benefits of a particular welfare benefits plan. Pursuant to 29 U.S.C. § 1022 (1988), the Employee Retirement Income Security Act requires employers to distribute summary plan descriptions to their employees. A summary must meet the criteria set out in 29 U.S.C. §§ 1022(a) and (b) to qualify as a summary plan description.

benefits offered under the plan in an easily comprehensible manner. GM acknowledged that this booklet served as the summary plan description mandated by ERISA for active employees, although the company was aware that it was not required to meet ERISA's formal requirements for SPDs until 1977." CR 78 at 18-19). On remand, the district court must determine whether the 1974 summary booklet meets the statutory criteria of a summary plan description and was intended to serve as such.

If the district court determines on remand that the 1974 booklet is to be treated as an official summary plan description, *Edwards* will apply to those individuals who retired while the 1974 "Highlights of Your GM Benefits" booklet was in effect because that booklet would have been given the status of an official summary plan description, and contains lifetime language with no express reservation of right. Similarly, if the district court determines on remand that the 1977 and 1980 "Your GM Benefits" booklets were summary plan descriptions generally distributed to employees before retirement, while the 1977 and 1980 "Your Benefits in Retirement" were distributed to individuals who had already retired, individuals retiring while those summary plan descriptions were in effect would be entitled to vested health care benefits under *Edwards*. General Motors must provide coverage to those employees who retired while summary plan descriptions were in effect that promised lifetime benefits at the company's expense and did not include an effective reservation of right provision. Where this situation exists, the summary plan description is unambiguous and trumps any policy language to the contrary. Judgment would be entered in favor of those individuals retiring under the 1977 and 1980 "Your GM Benefits" booklets because they would not have received summary plan descriptions containing limiting language until after retirement, at which time their rights to vested health care benefits would already have been established. In other words, if em-

ployees retired while the 1977 or 1980 "Your GM Benefits" were in effect and did not reecive the 1977 or 1980 summary booklets containing arguable reservation language (i.e., "changed from time to time") until after their retirement, they are entitled to vested benefits because the plan documents distributed to them while they were active employees included a summary plan description purporting to grant lifetime benefits with no effective reservation of right. *See Gentile v. Youngstown Steel Door Co.*, 1986 WL 17464 at *5 (6th Cir. Aug. 25, 1986) (stating that a court "must focus on the plan documents which were distributed to the retirees while they were active employees to determine the terms of their contract with the company"); *Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368, 1378 (6th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 667, 130 L.Ed.2d 601 (1994) (stating that once an employee is entitled to a benefit, it would be "illusory" to divest the benefit retroactively). This principle holds true even where General Motors may have included language at the end of a summary plan description stating that the summary does not include all terms and conditions of the master policy and that all rights and benefits are governed by the master policy. *See Hansen*, 940 F.2d at 982 (stating that a company may not "avoid the binding effect of its statements in the summary plan description on the basis of language included at the tail end of the booklet" and that a necessary corollary to holding that statements in a summary plan description are binding is that drafters of a summary may not disclaim its binding nature).

The *Edwards* principle is inapplicable where an underlying plan document is specific and a summary plan description is silent on a particular matter. Although "clear and unambiguous *statements* in the summary plan description are binding, the same is not true of silence." *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1428, 131 L.Ed.2d

310 (1995) (quoting *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir.), *cert. denied*, 510 U.S. 870, 114 S.Ct. 196, 126 L.Ed.2d 154 (1993)). Where neither a summary nor an underlying policy contains a promise of lifetime benefits, individuals retiring while such documents were in effect are not entitled to vested benefits. By contrast, where a summary contains no promise of lifetime benefits, but the policy itself promises such benefits and contains no reservation of right, individuals retiring while such documents were in effect are entitled to vested health care benefits. These principles apply in the context of those employees who retired prior to the effective date of the Employee Retirement Income Security Act. Benefit summaries distributed to those individuals do not have the same effect as official summary plan descriptions and the terms of the underlying policy, if unambiguous, control.

Where a summary plan description contains both a reservation of right provision and a promise of lifetime benefits, the general rule in this Circuit is that the plan unambiguously retains the company's right to amend the plan and that provision must govern. *In re White Farm Equip. Co.*, 788 F.2d at 1193 (stating that where documentary evidence is unambiguous, it is not subject to interpretation to ascertain its meaning and intent). In *Musto*, we held that extrinsic evidence may not be considered where a welfare benefit plan unambiguously reserves the plan administrator's right to amend or terminate the plan.[9] 861 F.2d at 902; *see also Schachner v. Blue*

[9] In *Musto*, the insurance policy stated that "[t]he company reserves the right to determine new premium contributions from time to time and at any time." 861 F.2d at 901-02. The court found this sentence to be unambiguous, and also found that nothing in the insurance certificates suggested that the company would be foreclosed forever from imposing new charges or increasing charges in the medical coverage provided to retired employees. *Id.* at 902. The court found that this unambigous statement was not counteracted by a brief statement in annual personal benefits statements

Cross & Blue Shield of Ohio, 77 F.3d 889, 894 (6th Cir. 1996) (stating that extrinsic evidence is admissible to aid in the interpretation of a contract only where an ambiguity is "patent" and "apparent on the face of the contract"); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (stating that, even where a company describes benefits as being for an employee's "lifetime" and "at no cost," where the company includes an unambiguous reservation of its right to change or discontinue medical expense plans, the plan's unambiguous reservation of right provision must govern).[10]

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stating that "[y]ou are not required to contribute for these benefits after your retirement." *Id.* at 903. Instead, the court held that that statement was "perfectly accurate at the time," and did not say anything "one way or the other about the possibility of future amendments regarding insurance benefits." *Id.* The court stated: "[t]o read this summary as saying that the plan can never be changed in such a way as to mandate retiree contributions for continued medical coverage is to read into the summary something its authors did not put there (a promise to provide lifetime "paid up" medical insurance), while reading out of the summary something that clearly was put there (an express reservation of the right to change the plan). Such a reading violates the basic principle that each provision of a contract should be interpreted as part of an integrated whole, to the end that all of the provisions may be given effect if possible." *Id.* at 906.

[10] The court in *Moore* declined to accept the plaintiffs' argument that, despite Metropolitan's clear reservation in the plan documents and summary plan descriptions of its right to amend or terminate plans, the contract between the company and employees consisted instead of the "totality of the representations made to the employees by the Company, and the actions of the employees in accepting those representations by remaining with the Company." 856 F.2d at 491-92. The court concluded that the "[p]laintiffs' argument, if accepted, would undermine ERISA's framework which ensures that plans be governed by written documents filed under ERISA's reporting requirements and that SPDs, drafted in understandable language, be the primary means of informing participants and beneficiaries." *Id.* at 492. The court concluded that, "absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries." *Id.*

In the case before us, we hold that, with two exceptions, if the district court finds that a summary plan description contains both an express reservation of right provision and a promise of lifetime benefits, judgment should be granted for General Motors with regard to individuals retiring while such plans were in effect on the ground that the company reserved to itself the right to amend its plan at any time. The two exceptions we refer to are the 1977 and 1980 sets of summary plan descriptions. In the event that the district court determines that both the "Your GM Benefits" and "Your Benefits in Retirement" were distributed generally to employees *prior* to retirement, we believe the "changed from time to time" language in the "Your Benefits in Retirement" booklets should be viewed as giving rise to an ambiguity in the plan language rather than as an unambigous reservation of General Motors' right to amend the plan. *See Wulf,* 26 F.3d at 1376 (stating that plan language is ambiguous "if it is subject to two reasonable interpretations"). We believe this is the best approach, and distinguish this case from *Musto* and *Boyer,* for two reasons. The first and more important reason is that, in 1977 and 1980, General Motors distributed two booklets within approximately two months' time which inherently contradicted each other. Both contained promises of lifetime benefits while one contained no reservation of right and the other contained arguable disclaimer language (i.e. "changed from time to time" language). Because these contradictory statements relating to the plaintiffs' health care coverage were contained in separate summary plan descriptions, if employees received both booklets prior to retirement, we do not believe the summary plan descriptions should be viewed as unambiguous. Although it may be determined on remand that the "changed from time to time" language did in fact reserve General Motors' right to amend the plan, an automatic deprivation of vested rights is not warranted because of the context in which General Motors distributed the inherently contradictory summary booklets within such a

short span of time. The district court, therefore, should examine extrinsic evidence to determine whether plaintiffs who retired under those summary plan descriptions are entitled to vested benefits.

We also distinguish this case from *Musto* and similar cases based on the type of language at issue. In *Musto*, the purported promise of lifetime benefits at the company's expense was weaker (i.e. the company stated that coverage would "continue" for retirees), whereas in the 1977 and 1980 summary plan descriptions, General Motors made explicit promises of "lifetime" benefits. At the same time, there was a controlling document in *Musto* which specifically reserved to the company the right to discontinue coverage and the "right to determine new premium contributions from time to time and at any time." *Boyer* is distinguishable on the same grounds: the assurances in that case were weaker than the lifetime promises made by General Motors in this case, and the company included an explicit reservation of right in the summary plan description.

In the event the district court must resolve an ambiguity created by the 1977 and 1980 summary plan descriptions, it may, under federal common law, use traditional principles of contract interpretation to resolve the ambiguity, including drawing inferences and presumptions and introducing extrinsic evidence. *Boyer*, 986 F.2d at 1005; *In re White Farm*, 788 F.2d at 1193. In resolving plan ambiguities, "ERISA plans, like contracts, are to be construed as a whole." *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 93 (3d Cir. 1992) (stating also that, "[i]n interpreting an ambiguous ERISA plan, a court may consider the intent of the plan's sponsor, the reasonable understanding of the beneficiaries, and past practice, among other things").

Finally, the district court erred in granting summary judgment against the general retirees who retired after

General Motors became fully self-insured in 1985. A genuine issue of material fact exists as to whether the 1985 "Draft Plan" constituted the governing plan document for the salaried retirees, and whether it contained the essential elements of the Employee Retirement Income Security Act's "written instrument" requirements. 29 U.S.C. §§ 1102(a) and (b). In addition, the district court made no findings as to whether or when the "Draft Plan" was amended, a finding essential to determining the rights of those individuals who retired during the self-insured period. On remand, the district court must determine whether the 1985 "Draft Plan" constituted a plan document, whether it was validly amended, and the effect of the 1985 and 1988 summary plan descriptions.[11]

2. The Early Retirees

In *Sprague IV*, the district court held that General Motors contracted away its right to alter health care benefits for early retirees through early retirement agreements and various other communications made to the early retirees by the company. The court concluded that both the long-form and short-form statements of acceptance of early retirement signed by the early retirees "evidence a binding bilateral contract between GM and its early retirees," 843 F.Supp. at 301, and are enforceable under the Employee Retirement Income Security Act as independent bilateral contracts or as modifications of General Motors' health care benefit plan. The court stated:

> The statements are framed in clear contract language of offer, acceptance and agreement. By signing them, the salaried retirees in subclasses (1) and (2) agreed to retire and accept the applicable bene-

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[11] The 1985 editions of "Your GM Benefits" and "Your Benefits in Retirement" both contained promises of lifetime benefits and express reservations of right. The 1988 version of "Your GM Benefits" contained no lifetime language, but did contain an explicit reservation of General Motors' right to amend the plan.

> fits. In exchange they gave up future employment (and re-employment) with GM, the opportunity to earn future salary, benefits and pension accruals, and waived some of their legal rights to state claims against GM.

Id.

Having concluded that General Motors contracted with the early retirees, the district court sought to determine the terms of the contracts by looking to basic contract law. Because the district court found that the statements of acceptance were not completely integrated contracts,[12] it considered extrinsic evidence concerning the meaning of the contractual terms and the parties' intent. In doing so, the court noted that, although the interpretation of an employee benefit plan generally begins with the official "written instrument" and/or the summary plan description, "members of the plaintiff class were offered a special deal, the terms of which go beyond the general retirement plan." *Id.* The district court thus did not rely on the formal plan and summary plan descriptions, but rather based its decision on the information given to the early retirees as they decided whether to leave their jobs. The information included both the terms of the special early retirement agreements and other extrinsic evidence, including oral statements. *Id.*

The parties' arguments on appeal raise two questions with regard to the status of the early retirees' health benefits. The first is whether employees can obtain vested rights to welfare plan benefits based on representations outside the official plan documents. The second is whether, if such agreements are enforceable, the district court in this case properly construed the terms of the contracts at issue.

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[12] The court found that the statements of acceptance did not contain all of the contract's terms because "[r]eference is made to the 'Special Early Retirement provisions of the General Motors Retirement Program' and the 'benefits applicable . . . under the provisions of the Programs.' " *Id.*

We find on the facts of this case that General Motors entered into contractual agreements with its early retirees whereby the company vested certain health care benefits in the retirees and their spouses in exchange for the early retirees' acceptance of early retirement and, in some cases, their release of General Motors from any claims of unlawful termination. As the district court found, "early retirement was presented . . . as a special package deal that included health care, separate and distinct from the regular GM retirement program." *Sprague IV*, 843 F. Supp. at 271. The district court made extensive and detailed factual findings with regard to the benefit summaries given and oral statements made to early retirees shortly before they decided to retire. We agree with the district court that the information on health care supplied to early retirees formed the basis of an agreement apart from the company's regular health care plan to provide early retirees with vested health care benefits in exchange for defined consideration, *Sprague IV*, 843 F.Supp. at 299, and affirm the district court's judgment in favor of the early retirees on this issue.

IV.

The parties also contest the district court's rulings on their estoppel claims. In *Sprague V*, the district court dismissed the general retirees' claims to health benefits based on principles of estoppel based on its holding in *Sprague I* that General Motors unambiguously reserved the right to change those benefits. The court held that, unlike the early retirees who signed special statements of acceptance of early retirement in return for a promise of lifetime benefits, there were no "clear and unambiguous" promises or representations of lifetime benefits upon which the general retirees could have reasonably relied. *Sprague V*, 857 F.Supp. at 1189. At the same time, the district court ruled that General Motors was estopped from modifying health care benefits as to the early retirees based on statements

of acceptance, summary plan descriptions, and certain benefit summaries distributed to early retirees at the time of early retirement. The court considered its ruling as to the early retirees to be an alternative basis for relief to the bilateral contract theory on which they prevailed in *Sprague IV*.

We have recognized that principles of estoppel may be applicable in the context of the alteration or termination of retiree health benefits provided pursuant to an employee welfare plan. *See Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1299-1300 (6th Cir. 1991); *see also In re Unisys Corp.*, 58 F.3d 896, 907 (3d Cir. 1995) (*Unisys I*) (stating that "[a]n ERISA beneficiary may recover benefits under an equitable estoppel theory upon establishing a material misrepresentation, reasonable and detrimental reliance upon the representation, and extraordinary circumstances"). Therefore, the district court properly noted that "[e]stoppel is a form of 'appropriate equitable relief' designed to redress both statutory violations and violations of the terms of the plan." *Sprague V*, 857 F.Supp. at 1186.

As the district court stated, "ERISA equitable estoppel 'precludes a party from exercising contractual rights because of his own inequitable conduct toward the party asserting the estoppel.'" *Id.* at 1188, *Armistead*, 944 F.2d at 1299. We have set forth the elements of equitable estoppel in an action pursuant to the Employees Retirement Income Security Act as follows:

> (1) conduct or language amounting to a representation of material fact; (2) awareness of the true facts by the party to be estopped; (3) an intention on the part of the party to be estopped that the representation be acted on, or conduct toward the party asserting the estoppel such that the latter has a right to believe that the former's conduct is so intended; (4) unawareness of the true facts by the party assert-

ing the estoppel; and (5) detrimental and justifiable reliance by the party asserting estoppel on the representation.

Swinney v. General Motors Corp., 46 F.3d 512, 522-23 (6th Cir. 1995) (citing *Armistead*, 944 F.2d at 1298).

As the district court indicated, promissory estoppel "holds a promisor liable for a clear and unambiguous promise which it reasonably should have expected would 'induce action or forbearance on the part of the promisee . . . and which does induce such action.' " *Sprague V*, 857 F.Supp. at 1188 (quoting Restatement 2d of Contracts § 90(1) as stating that, to prevail on a promissory estoppel claim, plaintiffs must show: (1) a clear and unambiguous promise; (2) a reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained by the party asserting the estoppel by reason of his reliance).

With these principles in mind, the district court held that the general retirees could not prevail on their estoppel claims due to "their inability to show that the alleged promises or representations upon which they allegedly relied are 'clear and unambiguous,' or that the statements 'amount[] to a representation of material fact.' " *Sprague V*, 857 F.Supp. at 1189 (stating also that the general retirees were unable to show detrimental reliance or that General Motors intended that they act on any representation or promise). The court found that, at best, any promises or representations given to the general retirees were ambiguous, and that any reliance on such statements was "inherently unreasonable and unjustified." *Id.*

Given the fact that we are affirming the district court's finding that the early retirees are entitled to vested health care benefits, there is no need to address the propriety of its alternative holding that the early retirees are entitled to such benefits based on theories of equitable and promissory estoppel. However, because we are holding that the dis-

trict court erred in its vesting analysis with regard to the general retirees, we now reinstate their estoppel claims.

On remand, the district court must first determine whether the policy and summary plan descriptions applicable to the various groups of general retirees unambiguously reserved General Motors' right to amend the plan. Individuals who retired under documents containing an unambiguous reservation of the right to amend will lose on their estoppel claims because there could be no justifiable reliance in those cases. *See Unisys I*, 58 F.3d at 908 (stating that "a participant's reliance on employer representations regarding benefits may never be 'reasonable' where the participant is in possession of a written document notifying him of the conditional nature of such benefits"); *Gill*, 981 F.2d at 860 (holding that where a plan unambiguously provides that benefits may be modified, "there is simply no factual basis for the application of estoppel"). Estoppel may be a viable theory, however, as to those retirees who retired under documents granting vested benefits or under documents that were ambiguous as to whether benefits were vested. *See Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821-22 (9th Cir. 1992). Such individuals must be given the opportunity on remand to demonstrate the elements of their estoppel claims.

V.

The plaintiffs also argue that the district court erred in dismissing the breach of fiduciary duty claims of both the general and early retirees in *Sprague I*. The district court did so in reliance on *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990), a decision of this Court holding that " a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan." *Sprague I*, 768 F.Supp. at 605.

On appeal, the plaintiffs argue that the district court misapprehended the scope of their fiduciary duty claim. The plaintiffs argue that their breach of fiduciary duty claim was based not only on General Motors' decision to amend the company's welfare benefits plan, but also "encompassed the full range of allegations in the complaint," including misleading communications by General Motors regarding plan administration. (Brief for Sprague at 19).

Section 404 of the Employee Retirement Income Security Act sets forth certain fiduciary duties which govern the management of both pension and welfare benefit plans. For purposes of determining whether fiduciary obligations attach to the activities related to welfare benefits plans, courts have distinguished between the administration of such plans and their establishment, amendment, and termination. Although an employer "clearly must satisfy fiduciary duties when administering benefit plans . . . it is equally plain that simply because an employer is also a benefits plan administrator 'ERISA does not require that "day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants."'" *Adams*, 905 F.2d at 947 (citation omitted).

This Circuit has made it clear that an employer's decision to reduce or otherwise modify welfare benefits will not give rise to a breach of fiduciary duty claim under the Employee Retirement Income Security Act. *See id.* (quoting *Musto*, 861 F.2d at 911) (stating that a company "does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"). As we stated in *Musto*, "[t]here is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second." 861 F.2d at 911. In situations where an employer decides to "establish, amend, or terminate a bene-

fits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards." *Id.* at 912; *see also Lockheed Corp. v. Spink*, —— U.S. ——, ——, 116 S.Ct. 1783, 1789, 135 L.Ed.2d 153 (1996) (stating that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans" and that they do not act as fiduciaries in those situations).

Nonetheless, the Employee Retirement Income Security Act provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . ." 29 U.S.C. § 1104(a)(1). In exercising those duties, a fiduciary "may not materially mislead those to whom the duties of loyalty and prudence are owed." *In re Unisys Corp.*, 57 F.3d 1255, 1261 (3d Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 1316, 134 L.Ed.2d 470 (1996) (*Unisys II*). This Court has stated:

> Under the exclusion from fiduciary standards for business decisions, corporate actions by plan administrators seeking to reduce the amount of unaccrued plan benefits, terminating a pension plan, and deciding whether or not to establish a plan, have all been found nonfiduciary. Several courts have, however, held that misleading communications to plan participants regarding plan administration (for example, eligibility under a plan, the extent of benefits under a plan) will support a claim for breach of fiduciary duty . . . a fiduciary may not materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed.

Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163 (6th Cir. 1988) (citations omitted).

The Supreme Court recently addressed the issue of whether an employer was acting in a fiduciary capacity for purposes of the Employee Retirement Income Secur-

ity Act when it misled employees regarding the security of their benefits if they transferred from the company into a new, separately-incorporated subsidiary. *Varity Corp. v. Howe,* —— U.S. ——, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). The Court began its analysis with the language of the statute, which provides that "a 'person is a fiduciary with respect to a plan,' and therefore subject to ERISA fiduciary duties, 'to the extent' that he or she 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Id.* at ——, 116 S.Ct. at 1071 (citing ERISA § 3(21)(A)). The Court found that the employer in that case was both the employer and the benefit plan's administrator, as permitted by the statute. The Court further found that, although "not all of [the company's] business activities involved plan management or administration . . . [the company] was exercising 'discretionary authority' respecting the plan's 'management' or 'administration' when it made these misrepresentations." *Id.*

The Court held that the company's intentional connection of statements about its subsidiary's financial health to statements about the future of employees' benefits "so that its intended communication about the security of benefits was rendered materially misleading," was an act of plan administration. *Id.* at ——, 116 S.Ct. at 1074. The Court further stated: "While it may be true that amending or terminating a plan . . . is beyond the power of a plan administrator . . . and, therefore, cannot be an act of plan 'management' or 'administration'—it does not follow that making statements about the likely future of the plan is also beyond the scope of plan administration . . . . plan administrators often have, and commonly exercise, discretionary authority to communicate with beneficiaries about the future of plan benefits." *Id.* Where plan administrators "participate knowingly and significantly in deceiving a plan's beneficiaries in order to save

the employer money at the beneficiaries' expense," they fail to act "solely in the interest of the participants and beneficiaries," and violate the duty of loyalty in Section 404(a)(1) of the Employee Retirement Income Security Act. *Id.*

In a case similar to the one before us, the Third Circuit recently held that a breach of fiduciary duty claim may be maintained where, despite a company's use of reservation clauses, summary plan descriptions contained "for life" language and company representatives misinformed employees that benefits would be continued "for life" after retirement. *Unisys II*, 57 F.3d at 1264. The retirees in that case argued that, even if the company was legally entitled to terminate the plans pursuant to the reservation of right clause, the company had breached its fiduciary duty by affirmatively misleading plan participants regarding the duration of their retiree medical benefits. In ruling that a breach of fiduciary duty claim could be maintained under the circumstances, the Third Circuit stated: "[T]his is not a case involving an employer's 'duty to remind.' Instead, this case is more accurately characterized as a dispute over an employer's duty, as an ERISA fiduciary, not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures." *Id.* at 1264.

Because the district court in this case summarily dismissed the plaintiffs' breach of fiduciary duty claim without any consideration of its merits, we reinstate the claim and remand for a determination of whether the plaintiffs are able to maintain their breach of fiduciary duty claim.

VI.

The plaintiffs argue as well that the district court erred in denying their demand for a jury trial. In *Sprague II*, the district court granted General Motors' motion to strike the plaintiffs' demand for a jury trial on the ground that the legal issues advanced by the plaintiffs substan-

tially mirrored the historically equitable relief sought under the Employee Retirement Income Security Act, and held that the plaintiffs were not entitled to a jury trial under the Act or the Seventh Amendment to the United States Constitution. 804 F.Supp. at 934, 939. The plaintiffs subsequently asked the district court to reconsider that ruling in light of a new Supreme Court case, *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), and the district court again denied the plaintiffs' request for a jury trial in *Sprague III*, 823 F.Supp. at 442.

On appeal, the plaintiffs contest the district court's denial of their demand for a jury trial. The plaintiffs dispute the district court's conclusions that the legal issues they advance substantially mirror the historically equitable relief sought under the Employee Retirement Income Security Act, and that the relief they seek is equitable in nature.

The district court's opinions on this issue are thorough and correct, and the plaintiffs raise no new arguments on appeal. We affirm the district court's resolution of this issue based on *Sprague II* and *Sprague III*.

VII.

Finally, the plaintiffs contest the district court's grant of only limited injunctive relief against General Motors. We need not address the inappropriateness of the injunction because it was only in effect to protect the early retirees pending appeal of this case.

The decisions of the district court are AFFIRMED in part and REVERSED in part, and the case is REMANDED to the district court for proceedings consistent with this opinion.

APPENDIX C

[Filed Aug. 4, 1994]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DVISION

No. 90-CV-70010
Hon. John Feikens

ROBERT D. SPRAGUE, *et al.*,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

FINAL JUDGMENT

This action came before the Court, Honorable John Feikens, District Judge, presiding, and the issues having been duly tried and decisions have been duly rendered,

1. In accordance with the Opinion and Order filed July 29, 1991:

a. Judgment is granted in favor of General Motors Corporation ("GM") on Counts II and IV of the Complaint as to the general retirees;

b. Count III of the Complaint is dismissed as to all salaried retirees;

2. In accordance with the Opinion and Order filed July 29, 1991, in accordance with the record, and in accordance with the Stipulation entered into by the parties on April 7, 1994, judgment is granted in favor of GM on Count I of the Complaint as to all salaried retirees;

3. In accordance with the Opinion and Order filed February 2, 1994, judgment is granted in favor of the early retirees in subclasses 1 and 2 on their claims under Counts II and IV of the Complaint.

4. In accordance with the Stipulation entered into by the parties on April 7, 1994:

a. Counts VI and VII of the Complaint are voluntarily dismissed by plaintiffs, with the proviso that plaintiffs are not precluded from litigating facts in support of those claims that might also support their claims under Count III, dismissed above;

b. Early retirees in subclass 4 who took the same types of retirement as members of subclasses 1 or 2 are members of subclasses 1 or 2, as appropriate, and judgment is granted in their favor on Counts II and IV as set forth above; and

c. Monetary relief will be calculated for prevailing class members following resolution of any appeal according to the ministerial procedure stipulated to by the parties. In order to undertake this task, the parties will utilize, as applicable: (1) GM records of monthly premiums (contributions) for basic health care benefits since January 1, 1994; (2) GM records of deductibles and copayments since 1988; (3) GM records as to denied health care claims since 1988; and (4) records from the plaintiff class in support of individual monetary claims as to health care benefits since 1988. Mitigation and offset issues, if any, will be resolved in connection with the individual class member claims presentations.

5. In accordance with the Opinion and Order filed July 18, 1994:

a. Judgment is granted in favor of the early retirees on their claims of promissory and equitable estoppel under Count V of the Complaint;

b. Judgment is granted in favor of GM on the claims of promissory and equitable estoppel asserted by the general retirees under Count V of the Complaint;

c. Plaintiffs' motion for injunctive relief is granted in part as follows: during the pendency of any appeal in this case, (1) GM is enjoined from making any further adverse changes to the health care benefits of prevailing class members; (2) GM is enjoined from requiring prevailing class members to pay monthly contributions or premiums for the Basic Medical Plan, Enhanced Medical Plan, Preferred Provider Organization Option and Health Maintenance Organization Option ("PPO") (excludes Extended Care Coverage); and (3) the total out-of-pocket amounts for co-payments and deductibles that GM may require prevailing class members to pay annually for the Basic Medical Plan, Enhanced Medical Plan and PPOs (excludes prescription drugs, dental, vision and mental health/substance abuse) shall be limited to $1500; and

d. GM's motion to stay the injunction pending appeal is denied.

/s/ John Feikens
JOHN FEIKENS
United States District Judge

Dated: Aug. 3, 1994.

APPENDIX D

UNITED STATES DISTRICT COURT
E.D. MICHIGAN
SOUTHERN DIVISION

No. 90-CV-70010

ROBERT D. SPRAGUE, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendant.

July 18, 1994

OPINION AND ORDER

FEIKENS, District Judge.

Before me are several matters intended to bring long-awaited closure to this prolonged litigation. The first two matters concern Count V of the Complaint, plaintiffs' equitable or promissory estoppel claims. The named plaintiffs, purporting to represent a class of approximately 84,000 General Motors Corporation ("GM") salaried retirees and their surviving spouses, assert that GM should be estopped from eliminating certain health care coverages and shifting health care costs. Mirroring past arguments, GM moves for partial summary judgment or to dismiss Count V, maintaining that it cannot be held liable because it expressly retained the right to modify health care coverage as it sees fit.

I held a bench trial on Counts II and IV of the Complaint for two subclasses of "early retirees." Because the

evidence presented at that trial also pertains to the early retirees' Count V claims, and because the parties have agreed [1] that no further trial is required on the early retirees' Count V claim, I may proceed to judgment pursuant to the procedures set out in Fed. R. Civ. P. 52. For the reasons stated below, I find in favor of the class of early retirees on Count V; that is, I hold GM liable under the doctrines of equitable and promissory estoppel for reducing or eliminating certain health care coverage for GM early retirees in 1988. I also rule that the "general retirees" cannot prevail on their Count V claims. I ac-

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[1] The parties agreed that I had adequate evidence to decide this issue during a June 16, 1994 telephone conference:

> The Court: What further evidence would there be . . . on promissory estoppel on behalf of the early retirees?
>
> . . .
>
> Mr. Fay (plaintiffs' attorney): . . . . I believe there is ample record evidence on the existing trial record.
>
> The Court: I think so. I—I believe that there is. How do you feel about that, Mr. Walker (GM's attorney)? Would General Motors want to present any further evidence?
>
> Mr. Walker: Well, your Honor, I—I must admit I haven't consulted with them, but I—I believe that there is adequate evidence in front of the Court to resolve this.
>
> The Court: . . . . That's the way I think I want to proceed, and that is to decide this promissory estoppel issue based both as to the general retirees and as to the early retirees, and I think that the evidence that I have before me in this rather complete trial that we had will enable me to do that. Let me ask would you want a further hearing on this, or would you want to submit whatever you wanted to submit on papers and let me proceed to a decision?

(Tr. at 7-8). The parties then agreed that no further hearing was necessary and that they would submit further briefs. (Tr. at 10-11).

GM seemed to back away from that agreement in a subsequent brief, where it argued that a further hearing might be required to determine whether each early retiree relied to his or her detriment on information provided. My decision would be the same even if GM were allowed out of the agreement, however. As I note *infra*, I find that plaintiffs have adequately shown that the early retirees detrimentally relied on GM representations or promises.

cordingly grant defendant's summary judgment motion as it pertains to that group of plaintiffs.

The final matter before me is plaintiffs' motion for an injunction to prevent GM from imposing program-wide deductibles and copayments or otherwise shifting health care benefits costs to the group of early retirees. In essence, plaintiffs ask that I order GM to comply with the terms of the contract found in *Sprague II*. Plaintiffs' motion for injunctive relief is granted in part. GM's motion to stay that injunction pending appeal is denied.

I. Background

The history of this case is well documented elsewhere and need not be repeated in its entirety. *See, e.g., Sprague v. General Motors Corp.*, 768 F.Supp. 605, 607-09 (E.D. Mich. 1991) ("*Sprague I*") (addressing Counts II, III, and IV); *Sprague v. General Motors Corp.*, 843 F.Supp. 266, 269 (E.D. Mich. 1994) ("*Sprague II*") (addressing Counts II and IV). For present purposes, it suffices to note that plaintiff Robert D. Sprague, together with 113 other named plaintiffs, originally brought this action in August 1989 claiming to represent a class of approximately 84,000 GM salaried retirees and their surviving spouses (collectively, the "retirees"). The essence of their complaint is that GM had promised them lifetime health care benefits, at no cost to them, and that GM in 1988 improperly reduced or eliminated aspects of these benefits. They claimed in Counts I, II, III, VI, and VII, that these reductions in health care benefits violated various provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. Count IV alleged that GM was liable under the federal common law of contracts and Count V alleged that GM was liable under the doctrines of promissory or equitable estoppel.

The original group of plaintiffs ultimately was split in two for the purposes of this litigation. The "general re-

tirees" are former GM employees who retired voluntarily pursuant to the terms of the "General Motors Retirement Program for Salaried Employees." Under this program, salaried employees were allowed to retire without GM's consent as early as age 55 if they had worked ten years with GM and earlier if they had worked for GM for thirty years or more. Former GM employees who were involuntarily retired at GM's insistence and former salaried employees who were eligible for retirement due to total and permanent disability also belong to the group of general retirees. Members of this group received actuarially reduced or delayed pension benefits upon retirement.

The "early retirees" consist of former GM salaried employees who accepted one of the numerous early retirement offers GM extended to many of its employees between 1974 and 1988. These retirements required the consent of both GM and the employee.

Many of the original Counts are now resolved. In 1990, both parties filed motions for summary judgment and GM moved to dismiss various Counts of the Complaint. I granted GM's motion to dismiss Counts II and IV as to the general retirees but denied that motion with respect to the early retirees. *Sprague I*, 768 F.Supp. at 612. I also dismissed Count III in its entirety. *Id.* In November 1991, I certified a class of all the salaried employees who took early retirement, or who agreed to take early retirement, prior to March 1, 1988, and their surviving spouses. This class consists of four subclasses: early retirees (1) who signed "long-form" statements of acceptance of early retirement; (2) those who signed "short-form" statements of acceptance; (3) those who signed "statements of intent to retire"; and (4) those who signed neither a statement of acceptance nor a statement of intent to retire. After a bench trial, I found for subclasses (1) and (2) of early retirees on Counts II and IV. *Sprague II*, 843 F.Supp. at 319.

After I issued *Sprague II* in February 1994, counsel for both parties met with me and entered into several stipulations. The first pertained to the task of calculating the damages for the prevailing plaintiffs. The parties agreed that this task is straightforward and uncontroversial or "ministerial" in nature and that final judgment therefore is appropriate.[2] *See Woosley v. Avco Corp.*, 944 F.2d 313, 317 (6th Cir. 1991) (finding that final judgment is appropriate when the remaining task of calculating damages is "mechanical," "uncontroversial," or "minsterial"). The parties also entered into several stipulations relating to the remaining subclasses of early retirees and the remaining Counts of the Complaint. The parties stipulated that I would dismiss Count I. They also stipulated that subclass 4 early retirees who took the same forms of retirement as the members of subclasses 1 or 2 are to be included in subclasses 1 or 2. Finally, plaintiffs agreed to dismiss Counts VI and VII of the Complaint.

II. Count V: Promissory and Equitable Estoppel

GM moves either for summary judgment or to dismiss Count V, plaintiffs' estoppel claims. Its first argument is that claims for promissory or equitable estoppel are not permitted under ERISA. I disagree.

It long has been established that GM's health care program is an "employee welfare benefit plan" as defined by ERISA. 29 U.S.C. § 1002(1), (3). It is also clear

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[2] To determine damages, GM agreed to provide to the plaintiff class (1) "written calculations of all monthly premiums billed to the members of the plaintiff class by [GM] since January 1, 1994," (2) "its records as to all deductibles and co-payments rendered to members of the plaintiff class since 1988," and (3) "its records as to its computer files of denied claims." Plaintiff class, in turn, agreed to furnish to GM its records in support of all individual monetary claims as to health care benefits since 1988. The parties also agreed that mitigation and offset issues, if any, will be resolved in connection with individual class member claims presentations. (April 7, 1994 Tr. at 6-7).

that ERISA's broad preemption provision means that plaintiffs' claims are governed exclusively by federal law. 29 U.S.C. § 1144; *see, e.g., Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276, 1276 (6th Cir. 1991), *cert. dismissed*, —— U.S. ——, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992). As a result, I must decide whether estoppel is an appropriate remedy under ERISA—including the common law of ERISA.

As an initial matter, I note that the U.S. Court of Appeals for the Sixth Circuit already has answered that question. That court consistently has recognized that estoppel is incorporated into the federal common law of contracts for purposes of ERISA. *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1299-1300 (6th Cir. 1991) (adopting estoppel principles for ERISA cases involving welfare plans); *Tregoning v. American Community Mut. Ins. Co.*, 12 F.3d 79, 83-84 (6th Cir. 1993) (rejecting plaintiffs' estoppel claim on the facts but recognizing that estoppel remains a viable theory under ERISA); *Gill v. Moco Thermal Indus., Inc.*, 981 F.2d 858, 860 (6th Cir. 1992) (estoppel not allowed on the facts of that case); *Sutter v. BASF Corp.*, 964 F.2d 556, 563 (6th Cir. 1992) (rejecting plaintiffs' promissory estoppel claim, but only because there was no evidence that the alleged misrepresentation was intentional). GM acknowledges that *Armistead* and its progeny recognize estoppel in ERISA cases but nevertheless maintains that these holdings conflict with the U.S. Supreme Court's holding in *Mertens v. Hewitt Assocs.*, —— U.S. ——, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). In short, GM argues that after *Mertens, Armistead* no long is good law.

Plan participants seeking relief under ERISA must identify one of "[t]he six carefully integrated civil enforcement provisions found in § 502(a) [29 U.S.C. § 1132 (a)]." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 105 S.Ct. 3085, 3092, 87 L.Ed.2d 96

(1985); *see also Mertens*, —— U.S. at ——, 113 S.Ct. at 2067 (stating that Congress did not intend to authorize remedies not expressly authorized by statute). Section 502(a)(3), which among other things, permits ERISA plan participants, beneficiaries, or fiduciaries to obtain "appropriate equitable relief" to redress ERISA violations or violations of the terms of an ERISA plan, is a natural candidate on which to base estoppel claims. *See Tregoning*, 12 F.3d at 83. *Mertens* is important to my analysis because it addressed the scope of relief available under § 502(a).

In *Mertens*, the Court held that a plan participant could not bring a cause of action under § 502(a)(3) against a non-fiduciary of an ERISA plan for knowingly participating in a fiduciary's breach of fiduciary duty. The Court explained that the term "appropriate equitable relief" in § 502(a)(3) contemplates "categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution)." *Mertens*, —— U.S. at ——, 113 S.Ct. at 2069. The plaintiffs' claim was for "compensatory damages"—a form of relief which simply did not meet the definition of "appropriate equitable relief."

GM maintains that *Mertens* bars plaintiffs' estoppel claims because, it argues, estoppel is a cause of action for compensatory damages (not "appropriate equitable relief") and accordingly is an unauthorized remedy which neither redresses statutory violations nor violations of the terms of the plan. I disagree. Estoppel is a form of "appropriate equitable relief" designed to redress both statutory violations and violations of the terms of the plan.

Boiled to its basics, the question here is whether the retirees had a vested right to lifetime health care benefits, at no cost to them, or whether GM had the right to change those benefits. Whether ERISA benefits vest to a large degree depends upon the intent of the parties to the plan. *See, e.g., Hansen v. White Motor Corp.* (*In re White*

Farm Equip. Co.), 788 F.2d 1186, 1193 (6th Cir. 1986) ("*White Farm*"). This is especially true in this case because a welfare plan is involved: the vesting of welfare plans, unlike the vesting of pension plans, *see* 29 U.S.C. § 1053, is not subject to a statutory minimum vesting requirement, but instead depends solely on the agreement reached between the parties. *Armistead*, 944 F.2d at 1297-1300; *see also White Farm*, 788 F.2d at 1192-93 (noting that "the statutory scheme of ERISA, though silent on the issue, counsels against the imposition . . . of an absolute rule effectively requiring mandatory vesting at retirement of retiree welfare benefits"). Determining whether the welfare benefits of a particular plan were intended to vest accordingly has become a matter of federal common law under ERISA. *Id.* at 1193-94; *Armistead*, 944 F.2d at 1297-98.

Thus, I cannot accept GM's claim that estoppel does not redress any statutory violation or any violation of the terms of the plan. ERISA gives the parties free rein to decide whether and under what conditions a particular welfare plan vests, *White Farm*, 788 F.2d at 1193, and requires courts to police those agreements, *Armistead*, 944 F.2d at 1298-1300. Policing those agreements naturally requires courts to inquire both into the content of the agreement and the conduct of the parties to the agreement. *Id.* at 1299. As a result, the U.S. Court of Appeals for the Sixth Circuit, following ERISA's command to develop a "federal common law of rights and obligations" in such situations, *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S.Ct. 1549, 1557, 95 L.Ed.2d 39 (1987); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 954, 103 L.Ed.2d 80 (1989); *Armistead*, 944 F.2d at 1297-98; *White Farm*, 788 F.2d at 1193-94, has borrowed from the common law of contracts to effectuate the terms of the parties' agreement and the equitable principles of estoppel to protect agreeing parties against inequitable conduct. *See Armistead*, 944 F.2d at 1299.

The court of appeals has made clear that § 502(a)(3)(B) provides a statutory basis for estoppel claims. *Tregoning*, 12 F.3d at 83.

I am aware that at least one court, the U.S. Court of Appeals for the Ninth Circuit, has invoked language from *Mertens* to hold that § 502(a)(3) does not support a cause of action for estoppel. *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1527-28 (9th Cir. 1993). GM argues that I should follow the reasoning in *Watkins* and rule that estoppel no longer is a viable theory in this circuit.[3] That, I refuse to do.

I note first that I am bound by the U.S. Court of Appeals for the Sixth Circuit's decisions in *Armistead* and *Tregoning* and not by the decision of the U.S. Court of Appeals for the Ninth Circuit's decision in *Watkins*. *Tregoning* was decided after *Mertens*: had the court of appeals wished to reexamine the efficacy of ERISA common law estoppel claims, it certainly had the opportunity to do so. It did not.

Nor would my decision be any different had the court of appeals not addressed this issue after *Mertens*. Prior to *Watkins*, the U.S. Court of Appeals for the Ninth Circuit had adopted a particularly limited version of estoppel in ERISA cases. Estoppel only was available in the Ninth Circuit where "'(a) the provisions of the plan at issue are ambiguous such that reasonable persons could disagree as to their meaning or effect, and (b) representations are made to the employee involving an oral interpretation of the plan.'" *Greany v. Western Farm Bureau Life Ins. Co.*,

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[3] I note that *Watkins* did not—as GM seems to imply—hold that estoppel claims are no longer recognized under ERISA after *Mertens*. Instead, the court held only that estoppel claims are not permitted under § 502(a)(3); the court explicitly recognized that estoppel remains a viable theory under § 502(a)(1) in situations where the plan language is ambiguous. *Watkins*, 12 F.3d at 1528 (noting that estoppel did not apply in that case because terms of the plan were "unambiguous").

973 F.2d 812, 821 (9th Cir. 1992) (quoting *Alday v. Container Corp.*, 906 F.2d 660, 666 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991)). Thus, courts applying Ninth Circuit law could not invoke estoppel to award the payment of benefits that would be inconsistent with the written plan.[4] *Watkins*, 12 F.3d at 1520. Given this legal backdrop, the court in *Watkins* reasoned that estoppel in the Ninth Circuit only could be justified under § 502(a)(1) as a way to determine, in the face of plan ambiguities, the rights and benefits of a participant or beneficiary "under the terms of the plan."[5] All non-§ 502(a)(1) "estoppel" claims in the Ninth Circuit (such as claims brought under § 502(a)(3)) necessarily lost the flavor of traditional "categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution)". *Mertens*, —— U.S. at ——, 113 S.Ct. at 2069.

In short, that estoppel under Ninth Circuit precedent could not be used to prevent defendants from asserting written contractual rights meant that there was nothing left to estop. Any "estoppel" claim brought under § 502(a)(3)'s "appropriate equitable relief" clause accordingly only could be packaged as a non-statutory cause of action to recover compensatory damages. But, as the court in *Watkins* correctly observed, after *Mertens*,

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[4] I find this to be a rather peculiar rule. If taken seriously, it would preclude plan participants from recovering even if the company was guilty of blatant inequitable conduct, such as outright deception or even duress. The approach taken by the U.S. Court of Appeals for the Sixth Circuit, on the other hand, would allow participants to recover in such situations.

[5] Section 502(a)(1) states in pertinent part:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . .

§ 502(a)(3) does not permit a non-statutory cause of action for compensatory damages.

The legal backdrop in the Sixth Circuit is crucially different. There is no bright-line rule in this circuit precluding parties from invoking estoppel to obtain the payment of benefits that would be inconsistent with the written plan. *See, e.g., Sutter,* 964 F.2d at 563 (noting that the general rule that the written plan controls will yield if plaintiffs can show that the defendant intentionally misrepresented relevant facts). Here, as in *Armistead,* plaintiffs "are alleging that [GM] may not exercise its asserted right of unilateral termination because of misleading representations of [GM's] agents." *Armistead,* 944 F.2d at 1299. Alternatively, plaintiffs assert that they relied on GM's promises not to exercise its unilateral right to change the retirees' health care benefits. Plaintiffs' estoppel claims thus cannot be construed as non-statutory causes of action for compensatory damages: instead plaintiffs ask that GM be prevented from asserting contractual rights. Estoppel here accordingly is a form of "equitable relief" analogous to "injunction, mandamus, and restitution" permissible under § 502(a)(3), *Mertens,* —— U.S. at ——, 113 S.Ct. at 2069, and not, as the court in *Watkins* phrased it, a "form of . . . recovery of compensatory damages." *Watkins,* 12 F.3d at 1520. I accordingly find that promissory and equitable estoppel claims—adopted by the court of appeals to police vesting agreements—remains cognizable under § 502(a)(3)(B), at least in a case like this involving a welfare plan.

III. Estoppel and the General Retirees

GM's second argument is addressed to the facts. It maintains that it should prevail even if estoppel is a valid theory under ERISA, because plaintiffs cannot meet the requirements of an estoppel claim. The relevant underlying facts for the general retirees differ significantly from those pertaining to the early retirees. I accordingly treat this second argument for each group separately.

ERISA equitable estoppel "precludes a party from exercising contractual rights because of his own inequitable conduct toward the party asserting the estoppel." *Armistead*, 944 F.2d at 1299. To prevail on an equitable estoppel claim, plaintiffs must show:

> 1) conduct or language amounting to a representation of material fact;
>
> 2) awareness of the true facts by the party to be estopped;
>
> 3) an intention on the part of the party to be estopped that the representation be acted on, or conduct toward the party asserting the estoppel such that the latter has a right to believe that the former's conduct is so intended;
>
> 4) unawareness of the true facts by the party asserting the estoppel; and
>
> 5) detrimental and justifiable reliance by the party asserting estoppel on the representation.

Armistead, 944 F.2d at 1298.

Promissory estoppel, in turn, holds a promisor liable for a clear and unambiguous promise which it reasonably should have expected would "induce action or forbearance on the part of the promisee . . . and which does induce such action." Restatement (Second) of Contracts § 90(1); *see Elmore v. Cone Mills Corp.*, 23 F.3d 855, 868 (4th Cir. 1994) (en banc) (Murnaghan, J., concurring); *Aquilio v. Police Benevolent Ass'n of the N.Y. State Troopers, Inc.*, 857 F.Supp. 190, 198-199 (N.D. N.Y. 1994). The U.S. Court of Appeals for the Sixth Circuit, while recognizing that promissory estoppel is cognizable under ERISA, has yet to set out the elements of a promissory estoppel claim.[6] Under the Restatement of

[6] In *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992), the court stated that promissory estoppel cannot lie for alleged misrepresentations without showing that defendant intentionally deceived the plaintiffs. *Id.* at 563. Although the court purported to apply a

Contracts, to prevail on a promissory estoppel claim, plaintiffs must show: (1) "a clear and unambiguous promise," (2) "a reasonable and foreseeable reliance by the party to whom the promise is made," (3) and "an injury sustained by the party asserting the estoppel by reason of his reliance." Restatement (Second) of Contracts § 90 (1981).

An obstacle to the general retirees' estoppel claims is their inability to show that the alleged promises or representations upon which they allegedly relied are "clear and unambiguous," or that the statements "amount[ ] to a representation of material fact." The alleged promises or representations—taken out of context from summary booklets distributed by GM or its insurance carriers over the years—contained language similar to: "Your basic health care coverages will be provided at GM's expense for your lifetime." *See Sprague I*, 768 F.Supp. at 610. This language, put back in its proper context, does not unambiguously grant a *vested* right to lifetime welfare benefits, however. As I detailed at great length in *Sprague I*, language elsewhere in the plan documents, summary booklets, and summary plan descriptions in fact reveals that the opposite is true: GM expressly reserved the right to change the plan. *Id.* at 608-11. These plan documents reveal that GM never unambiguously promised or represented that it would provide the general retirees with vested health care benefits. *Id.* at 610-11.

I also note that the general retirees have failed to show detrimental reliance or that GM intended that the general retirees act on any representation or promise. Unlike the early retirees, *see infra*, the general retirees did not sign

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promissory estoppel theory, the reference to misrepresentations seems to indicate that it in fact applied an equitable estoppel theory. As one court noted, "[e]quitable estoppel depends on a misrepresentation of an existing fact, while promissory estoppel requires a promise concerning future intent." *Trilogy Variety Stores, Ltd. v. City Products Corp.*, 523 F.Supp. 691, 697 n. 3 (S.D. N.Y. 1981).

statements of acceptance or statements of intent to retire early, nor did GM's alleged representations induce them to retire early. Plaintiffs maintain general retirees could have demonstrated their reliance in ways other than early retirement—for example, workers who retired at 65 might have worked longer to accumulate greater assets had they not been assured lifetime health care at GM's expense, or these retirees could have adopted some other method of financial planning. This is mere speculation. Staving off summary judgment requires more than "some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 340 (6th Cir. 1993) (citing *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).[7]

Furthermore, both promissory estoppel and equitable estoppel require that any reliance on the alleged promises or representations be reasonable or justifiable. The alleged promises or representations given to the general retirees were at best ambiguous. I accordingly find that any such reliance on these statements was inherently unreasonable and unjustified. The general retirees cannot make out an estoppel claim. *See Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir. 1993) (charging plan participants with knowledge of plan document language which expressly provided that the benefits could be altered at any time).

IV. Estoppel and the Early Retirees

Strictly speaking, it is unnecessary for me to reach the estoppel claims of subclasses 1, 2, and 4 of the class of

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[7] Plaintiffs maintain that they should be allowed further discovery to flesh out these claims. That request is denied. Further discovery would be fruitless, in part because GM did not unambiguously promise or represent that the general retirees would receive lifetime health care benefits at no cost to them. Even if some of the general retirees could show reliance, that reliance (as I note in the text) would be unreasonable.

early retirees because these subclasses prevailed at trial on Counts II and IV.[8] I only address the issue because the parties have requested me to do so. My ruling here provides an alternative basis for relief to the bilateral contract theory found in *Sprague II*.[9]

In *Sprague II*, I found that GM entered into an extra-plan, bilateral contract or "special deal" with subclasses 1 and 2 of the class of early retirees under which GM promised these early retirees and their surviving spouses health care benefits for life at no cost to them in exchange for the retirees' promise to give up future employment with GM, the opportunity to earn a future salary, benefits and pension accruals, and various state law claims. *Sprague II*, 843 F.Supp. at 301, 308, 319. Much of the findings in *Sprague II* also support the early retirees' estoppel claims. As I noted in the introduction to this opinion, the parties have agreed that no further evidence need be presented on this issue. That is, I am not bound by the requirements of Fed. R. Civ. P. 56, but am free to make findings of fact and conclusions of law pursuant to the procedures set out in Fed. R. Civ. P. 52. I accordingly incorporate the findings of fact that I made in *Sprague II* for the purposes of this opinion.

GM has argued that ERISA precludes plaintiffs from invoking oral statements made to class members to establish the required promise or representation necessary to their estoppel claim. That is, GM maintains that plaintiffs may only use written promises or representations to establish their estoppel claims. I do not agree.

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[8] As noted, the parties have stipulated that subclass 4 retirees who took the same forms of retirement as members of subclasses 1 or 2 are considered members of subclasses 1 and 2 and accordingly fall into the ambit of my decision in *Sprague II*.

[9] I also note that the parties have not asked me to decide subclass 3's Count II and IV claims. These claims technically remain undecided after this opinion. That is of no import, however, because subclass 3 prevails on its Count V claim.

I acknowledge that there is no requirement that the common law of ERISA adopt the doctrines of promissory and equitable estoppel in their purest Restatement forms. Instead, courts have made clear that the application of estoppel must comport with other ERISA requirements to effectuate the statute's larger goals. *See, e.g., Armistead,* 944 F.2d at 1300 (discussing problems involved with applying estoppel principles when pensions plans are involved); *cf. Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448, 457, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1957) (noting that the federal common law developed to govern collective-bargaining agreements must comport with the policies of the underlying federal statute). For example, courts have ruled that parties may not bring an estoppel action based on oral representations regarding pension benefits because this effectively would amount to an oral modification of the plan in violation of the writing and amendment requirements of 29 U.S.C. §§ 1102(a), (b)(3). *See Nachwalter v. Christie,* 805 F.2d 956, 960 (11th Cir. 1986).

I nevertheless conclude, as I did in *Sprague II,* that plaintiffs may rely on oral as well as written assurances to establish their claims. As the court in *Armistead* noted, accepting oral modifications is troublesome when a pension plan (as opposed to a welfare plan) is involved because contributions and pay-outs in pension plans are determined by actuarial assumptions reflected in the terms of the plan. *Armistead,* 944 F.2d at 1299-300. As a result, "the rights of other plan participants would be jeopardized by unrecorded oral agreements between plan officers and favored plan participants." *Id.* at 1299. *Armistead* also made clear, however, that an estoppel claim based only on oral assurances could be maintained in a welfare plan case, at least if the welfare plan gave the company the right to modify the plan's provisions and the plaintiffs took detrimental action as a result of the company's oral assurances. *Id.* at 1300; *see also Gordon,* 999 F.2d at 137 (recognizing that although "a basic prin-

ciple of ERISA [is] that terms of a plan may not be modified or superseded by oral statements or other extrinsic evidence," estoppel based on oral assurances remains a viable theory in situations like *Armistead*); *Sutter*, 964 F.2d at 563 (recognizing that the written plan must yield if the company's oral misrepresentations were made in bad faith). My analysis accordingly relies both on GM's oral and written statements that the early retirees would receive lifetime health care benefits at no cost to them.

The first factor required to establish promissory estoppel (a clear and unambiguous promise) and the first factor required to establish equitable estoppel (conduct or language amounting to a representation of material fact) are easily met. As I found in *Sprague II*, the early retirees were told both orally and in writing that their early retirement would be accompanied by the health care benefits existing at the time of their retirement and that these benefits would continue, at no cost to the retirees, for their lives and for the lives of their surviving spouses. *Sprague II*, 843 F.Supp. at 308, 319.

I also find that the second through fourth equitable estoppel elements are met. GM was aware of the "true" facts in this case. That is, GM was aware of its own belief that it was free to unilaterally amend health care benefits; notwithstanding that belief, GM induced the early retirees to retire by telling them that they would receive the benefits for life at no cost to them. *Cf. Armistead*, 944 F.2d at 1299 (stating that the "true" fact there was the company's belief that it could terminate retirement insurance despite its assurances to the contrary). The early retireees, on the other hand, were unaware of this fact; GM repeatedly stressed that the retirees would be getting lifetime health care to no cost to them and did not streess the possibility that GM might change this benefit at a future date. *See, e.g., Sprague II*, 843 F.Supp. at 308 (discussing the Morris Memorandum). The evidence at trial showed that GM intended that the early retirees

act on these representations by retiring early: the representations were intended to inform and encourage early retirement so that GM could reduce its work force. *See Sprague II*, 843 F.Supp. at 303, 308.

The final two equitable estoppel elements and the final promissory estoppel element are also met. These elements require that the retirees rely on the promise or representation and that such reliance be both reasonable or justifiable and the cause of an injury or some other detriment. Although objective manifestations of intent are alone sufficient to create a binding contract, *see, e.g., Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 873 (9th Cir.) ("Under the modern theory of contracts we look to objective, not subjective, criteria in ascertaining the intent of the parties."), *cert. denied*, 444 U.S. 981, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979), to prevail on an estoppel theory, on the other hand, plaintiffs must show that they subjectively relied upon the promise or representation, 31 C.J.S. *Estoppel* § 71 (1964).

In *Sprague II*, I found that the signing of statements of acceptance of early retirement, coupled with actual early retirement (which included giving up the opportunity to earn a future salary, benefits and penson accruals), and the surrender of various state law claims, evidenced a binding bilateral contract between GM and its early retirees. At the bench trial in *Sprague II*, it became clear that lifetime health care benefits at no cost was a significant part of GM's early retirement offer. *See, e.g., id.* at 306-08. These facts convinced me that it is more likely so than not so that the early retirees were subjectively induced by the retirement offers (an important aspect of which was GM's promise to provide lifetime health care benefits at no cost) to sign statements of acceptance and to give up their lucrative jobs at GM and accept early retirement.

I also find that this reliance was reasonable and justifiable. GM led the early retirees to reasonably believe that they were receiving a special deal: notwithstanding

language in the plan documents to the contrary, the early retirees would receive lifetime health care benefits at no cost to them. I repeat my finding from *Sprague II*, that "in the context of [these] special early retirement offers, class members could, and did, justifiably rely on information supplied to them, in both written and oral form, at the time of their retirements." *Id.* at 306.

The same result follows for subclass 3 early retirees, the group of early retirees who signed statements of intent to retire. The only difference between this subclass and subclasses 1 and 2 is that members of subclasses 1 and 2 signed statements of acceptance and members of subclass 3 only signed statements of intent to retire. This difference is not significant. Members of subclass 3, like the other early retirees, were promised health care benefits for their lives and for their spouses' lives at no cost to them in exchange for their promise to give up future employment with GM, the opportunity to earn a future salary, benefits and pension accruals, and various state law claims. In both situations, plaintiffs were effectively induced to retire early because GM's promises or representations.

I accordingly find, based on the facts presented at the trial of Counts II and IV, that the early retirees should prevail on their promissory and equitable estoppel claims.

V. Plaintiffs' Motion for an Injunction

The final matter before me is plaintiffs' motion for injunctive relief. They complain that GM continues to impose program-wide deductibles and copayments and to otherwise shift health care benefits costs to the early retirees despite the order I issued in *Sprague II*. They accordingly ask that I issue an injunction requiring GM to immediately comply with that order.

Section 502(a)(3) of ERISA gives district courts the authority to grant appropriate injunctive relief. *See Laborers Fringe Benefit Funds—Detroit and Vicinity v. North-*

west Concrete & Constr., Inc., 640 F.2d 1350, 1352 (6th Cir. 1981). The prerequisites for an injunction are: (1) plaintiffs are threatened by some irreparable injury for which they have no adequate remedy at law, (2) that real, not fancied, irreparable injury is threatened, and (3) that the issuance of the injunction does not offend public policy. *Id.* at 1353.

Here, plaintiffs claim that some form of injunctive relief is warranted by the threat of future GM non-compliance with the terms of the bilateral contract found in *Sprague II*. I agree.

Numerous cases have held that the injuries resulting from the denial of health care benefits are irreparable and justify the grant of injunctions. *See, e.g., International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294 (6th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 2941, 119 L.Ed.2d 565 (1992); *United Steelworkers v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987); *United Steelworkers v. Fort Pitt Steel Casting*, 598 F.2d 1273, 1280 (3d Cir. 1979); *Golden v. Kelsey-Hayes Co.*, 845 F.Supp. 410 (E.D. Mich. 1994); *Schalk v. Teledyne, Inc.*, 751 F.Supp. 1261, 1264, 1267-69 (W.D. Mich. 1990). In *International Resources*, for example, the U.S. Court of Appeals for the Sixth Circuit upheld a district court's finding that the denial of plaintiff's health care benefits amounted to irreparable harm because it made the retention of qualified caretakers difficult, which would adversely affect the plaintiff's health and potentially lead to irreversible physical harm. *International Resources*, 950 F.2d at 302. A contract to provide health care simply is unlike other contracts: retirees who are currently being deprived of health care which they cannot afford can never be adequately compensated by a future damages proceeding. *See, e.g., Schalk*, 751 F.Supp. at 1264, 1267-69 (finding irreparable harm in patients being forced to forego medical treatment because of deductible and co-payments, and in the financial planning burden resulting from the uncertainty of future medical costs). I accord-

ingly find that plaintiffs have met the first branch of the *Laborers* test.

I also find that the second branch of the *Laborers* test is met. One of the policies behind ERISA is to protect contractually defined benefits. *Firestone Tire,* 489 U.S. at 113, 109 S.Ct. at 955; *Schalk,* 751 F.Supp. at 1268. Further, as the court in *Schalk* noted, "the public interest lies in protecting the legitimate expectations of retirees that their health insurance will be provided for the rest of their lives" and "in the preservation of a healthy population." *Id.*

My conclusion that some sort of injunctive relief is required does not dictate that I grant plaintiffs' request for a broad injunction requiring GM to comply with the precise terms of the contract found in *Sprague II,* however. Such a broad form of injunctive relief would be inconsistent with the requirement that I grant an injunction only in cases where the denial of health care benefits will lead to irreparable harm. It also would pose an unnecessary hardship on GM. Instead, the injunction I issue is designed to afford interim relief to those members of the class of early retirees who otherwise would be deprived of health care or dissuaded from purchasing coverage. The injunction only is in effect as an interim solution pending appeal of this case. I hereby order that:

First, GM shall make no further adverse changes to the health care benetfis of the prevailing class members during the pendency of the appeal of this case;

Second, GM shall not require prevailing class members to pay monthly contributions or premiums for their basic health care benefits for all health care options.;

Third, the total out-of-pocket amounts that prevailing class members are required to pay shall be limited to $1500 per year.

Defendant argues that an injunction is premature. I disagree. Since my order in *Sprague II,* GM has continued

to make adverse health care changes affecting members of the class of early retirees. GM further was unwilling to stipulate to the interim provisions described above. This interim injunction is the only way to prevent further cost shifting, and to protect members of the prevailing class who might otherwise would be deprived of health care or dissuaded from purchasing coverage.

VI. Defendant's Motion to Stay the Injunction Pending Appeal

Finally, GM asks that I stay this injunction pending appeal. The injunction accompanying this opinion is specifically designed as an interim remedy to assist prevailing plaintiffs while this case is on appeal. GM's motion is denied accordingly.

VII. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that defendant's motion to dismiss Count V of the Complaint IS DENIED; that defendant's motion for summary judgment on Count V of the Complaint is GRANTED IN PART and DENIED IN PART; that the class of early retirees has prevailed on Count V of the Complaint; that the plaintiffs' motion for injunctive relief is GRANTED IN PART and DENIED IN PART.

A form of judgment may be presented by plaintiff class. That judgment shall incorporate the parties' April 7, 1994 stipulation regarding the manner in which financial relief to plaintiff class will be calculated upon resolution of appeal.

APPENDIX E

UNITED STATES DISTRICT COURT
E.D. MICHIGAN, S.D.

No. 90-CV-70010

ROBERT D. SPRAGUE, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendant.

Feb. 2, 1994

OPINION AND ORDER

FEIKENS, District Judge.

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I. BACKGROUND

Beginning in 1974, and continuing at least through 1988, General Motors Corporation (GM or the Corporation) used various incentive programs to encourage early retirement by salaried employees who were otherwise ineligible for full retirement benefits. Generally, the programs targeted employees between the ages of 55 and 60. In some cases, employees younger that 55 were given the option of layoff followed by early retirement. Plaintiffs represent a class of GM salaried early retirees who claim that GM breached its contractual promise to provide them with unreduced lifetime health care benefits at no cost to them.

The early retirement offers made by GM were designed to reduce the overall number of salaried employees on GM's payroll. From 1974 to 1987 GM went through a series of reorganization and down-sizing programs of which early retirement was an integral part.[1] Some of the early retirement offers were directed to particular plants or divisions of GM; others were corporate-wide.

GM gave employees a strong incentive to retire early by offering enhanced retirement benefits. The nature and extent of those enhancements are the subject of this dispute. The early retirees claim that GM agreed to continue health care benefits at no cost to them throughout their retirement at the same level they received before retirement. GM denies this, and says that it promised only enhanced pension benefits.

Robert D. Sprague, together with 113 other named plaintiffs, filed a Complaint on August 8, 1989, stating that they represent a putative class of approximately 84,000 General Motors salaried retirees and their surviv-

[1] In 1974 GM employed approximately 150,000 salaried workers. By 1978, after the sale of several divisions, major reorganization, and numerous early retirements, the number of salaried employees was reduced to approximately 120,000. (Trial Transcript (Tr.), Vol. VIII(A) at 35, 38.)

ing spouses. The group was originally composed of both general and early retirees.

For purposes of this opinion, "general retirees" are those salaried retirees who voluntarily retired, either at age 65 or before, and were able to do so without GM's consent, pursuant to the terms of the General Motors Retirement Program for Salaried Employes. Under the Program, employees could retire without GM's consent as early as age 55 if they had at least ten years of service, and even earlier if they had worked for GM for thirty years or more. However, employees who took this type of early retirement received actuarially reduced or delayed pension benefits. General retirees also include employees who were involuntarily retired at GM's insistence, and those eligible for retirement due to total and permanent disability.

"Early retirees" include former GM salaried employees who voluntarily accepted one of GM's numerous early retirement offers made between 1974 and 1988. These retirements required the consent of both the employee and employer. All employees who retired prior to age 65 could be referred to as early retirees, and sometimes were in GM documents. This is true whether the employee voluntarily retired, was forced out by GM, or accepted a special early retirement offer. I will use the term in a narrower sense, as a generic term for all early retirees who accepted early retirement offers made by GM prior to 1988 that required both employer and employee consent.

Counts II and IV of the Complaint are its essence. In Count IV, plaintiffs complain that GM violated the terms of a contractual agreement it entered into with its early retirees when, in 1988, it modified certain health care benefits available to early retirees, by either reducing or eliminating them. Plaintiffs rely on principles of federal common law in support of this claim. In Count II, plaintiffs complain that GM violated the terms of its health care

plan, and thus the Employee Retirement Income Security Act (ERISA) §§ 402, 502(a)(1)(B) and 502(a)(3), 29 U.S.C. §§ 1102, 1132(a)(1)(B) and 1132(a)(3), when it made these changes, because it had previously agreed not to adversely modify the health care benefits early retirees receive.

The Complaint also alleges breach of fiduciary duties in violation of 29 U.S.C. § 1104 (Count III), and promissory estoppel (Count V). Finally, it alleges that GM failed to maintain plan documentation as required by ERISA, 29 U.S.C. § 1102 (Count I), refused to supply information requested by beneficiaries in violation of 29 U.S.C. § 1132(e) (Count VI), and failed to comply with requirements for summary plan descriptions, 29 U.S.C. §§ 1022, 1024, 29 C.F.R. §§ 2520.102-2, 2520.102-3 (Count VII).

In late 1990 the parties filed cross-motions for partial summary judgment. GM moved for dismissal of Count II. Plaintiffs moved for summary judgment on behalf of certain early retirees on Counts IV and V. On July 29, 1991, I issued an Opinion and Order granting General Motors' motion in part, and denying plaintiffs' motion. *Sprague v. General Motors Corp.*, 768 F.Supp. 605 (E.D. Mich. 1991). That opinion is incorporated herein by reference. I granted summary judgment as to general retirees, but denied it for early retirees. Finally, I dismissed Count III of plaintiffs' Complaint.

On November 4, 1991, I certified a class of approximately 50,000 salaried early retirees, over GM's objection. The class includes all salaried employees who took early retirement, or agreed to take early retirement, prior to March 1, 1988, or their surviving spouses. I designated four subclasses: (1) Early retirees who signed "long-form" statements of acceptance of early retirement; (2) early retirees who signed "short-form" statements of acceptance of early retirement; (3) early retirees who signed "state-

ments of intent to retire"; and (4) early retirees who signed neither a statement of acceptance nor a statement of intent to retire.

The parties filed a second set of partial summary judgment motions in 1992. As to these motions, I concluded that the case should go to trial for subclass (1) and (2) on Counts II and IV only. All other claims, other than Count III which had been previously dismissed, including a prayer for damages, were held in abeyance. I also denied plaintiffs' motion for a jury trial.

II. ISSUE PRESENTED

Did GM, in the period from 1974 to 1988, contract with its early retirees to vest in them certain health care benefits by promising them and their spouses that such health care benefits would continue for their lifetimes, at no cost to the retirees and their spouses, in exchange for the acceptance by the early retirees of early retirement?

III. CONTENTIONS OF THE PARTIES

Plaintiff class relies on the undisputed fact that their early retirements had to be mutually agreed to by both themselves and GM. Unlike the general retirees who had a right to retire under the ERISA plan, plaintiff class could not take early retirement unless GM agreed, and GM could not force early retirement unless the retirees agreed.[2] This mutual agreement was reflected in statements of acceptance early retirees were required to sign.

Plaintiff class contends that these statements of acceptance, by which they gave up lucrative jobs and in some cases released GM from any claims of unlawful termination, cemented a contractual agreement between them-

[2] Some early retirees were eligible, at the time of their retirement, for a form of general retirement which did not require GM consent. However, if they had selected this form of retirement, their pension benefits would have been reduced.

selves and GM for certain retirement benefits, including health care. GM argues that it never intended nor conveyed to its putative early retirees an intent to vest lifetime health care benefits as part of its early retirement offer. It contends that the offer consisted of nothing more than actuarially unreduced pension benefits. The various special early retirement programs were amendments to its retirement income benefit plan—a plan designed to provide retirement income, not health care. The health care program, it argues, was a separate and distinct ERISA plan. According to GM, it provided health care to retirees by virtue of the fact that they were retirees, not because they were *early* retirees. Thus, GM argues, the health care benefits were subject to the same terms and conditions, including GM's right to amend, as for general retirees.

Plaintiff class claims that early retirement was presented to its members as a special package deal that included health care, separate and distinct from the regular GM retirement program. They rely on information provided to them, both written and oral, at the time of retirement to establish their contract right to unreduced health care benefits. Because the statements of acceptance are facially ambiguous, they argue that this additional written and oral evidence must be considered to determine the full scope of the early retirement agreements. Any ambiguities, they argue, should be interpreted in their favor pursuant to the doctrine of *contra proferentem*.

During the many weeks of this bench trial, my courtroom was usually filled with GM early retirees. For the most part, they appeared content and physically fit. Of those who testified, some conceded that, even after the 1988 changes, they continue to enjoy a good health care program. I had to keep in mind that this was not the issue that brought them here. Even if GM continues to provide well for them in retirement, this could not excuse

GM's breach, if indeed it had agreed with the early retirees to vest health care benefits at no cost to them. Likewise, the fact that GM needed to substantially reduce its salaried work force in the 1970's and 1980's in order to remain viable could not excuse a promise made to early retirees.

Throughout this litigation, plaintiffs have attempted to rely in part on health care promises made to hourly employees of GM. Plaintiffs argued that long-standing GM policy required that salaried retirees be treated at least as well as hourly retirees. I conclude that while this is interesting history, the special deal that the plaintiff class claims GM made with them must be considered only on the evidence applicable to it.

Some of plaintiffs' contentions could be analogized to the court-crafted principle known as the *Toussaint* doctrine. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980). This principle in Michigan law holds that employment contracts ordinarily considered as terminable at will cannot be so terminated if the employer, by policy or communication, holds out to the employee that employment may not be terminated except for cause. I do not find the *Toussaint* doctrine applicable, but I do see a similarity. GM maintains that it reserved the right to terminate health care benefits at will. Plaintiffs argue, as in *Toussaint*, that a special deal precludes this. Whether the special deal that the plaintiff class claims was made precludes GM from modifying health care benefits, however, must be decided by principles of federal common law, not the Michigan common law.

IV. THE CLASS ACTION

Before I consider these issues and contentions, I take up GM's renewed motion to decertify the class. At the close of trial, GM argued that evidence presented did not demonstrate the commonality and typicality of claims

required for class certification by Federal Rules of Civil Procedure (Fed. R. Civ. P.) 23(a)(2) and (3). In the alternative, it asked that I exclude from the class those individuals who retired after GM's December 11, 1987 announcement that the health care plan would be changed, but before those changes were implemented on March 1, 1988.

By order dated November 4, 1991, amended April 9, 1992, I certified this case as a class action under Fed. R. Civ. P. 23(b)(2), to be maintained on behalf of all salaried retirees of GM who took early retirement, or agreed to take early retirement, prior to March 1, 1988, or their surviving spouses. Four subclasses were certified: (1) Those early retirees who signed long-form statements of acceptance of early retirement; (2) early retirees who signed short-form statements of acceptance of early retirement; (3) early retirees who signed statements of intent to retire; and (4) early retirees who signed neither a statement of acceptance of early retirement nor a statement of intent to retire. Persons who filed both a long-form and short-form statement of acceptance were certified to be in subclass (1). Persons who filed both a statement of intent to retire and a statement of acceptance were certified to be in subclass (1) or (2), as appropriate.

In accordance with the requirements of Fed. R. Civ. P. 23(b), I found that:

(1) The class is too numerous—approximately 40,000[3] early retirees—for practical joinder of all its members;

(2) Questions of law and fact common to the class exist;

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[3] Trial evidence demonstrated that the class is actually composed of approximately 50,000 early retirees or their surviving spouses. (*See* Plaintiffs' Exhibits (Pl. Ex.) 9 and 10.)

(3) The claims of the original 113 named plaintiffs who are early retirees are typical of the claims of the class as a whole; and

(4) The named plaintiffs will fairly and adequately protect the interests of the class.

I also made the following findings:

a. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy;

b. GM has acted on grounds generally applicable to the class, thereby making any final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole or with respect to subclasses as a whole; and

c. The prosecution of separate actions by the individual class members would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would as a practical matter be dispositive of the interests of other nonparty members.

On the basis of the evidence presented at trial. I reaffirm my findings regarding the composition and characteristics of the class.

GM argues that the evidence demonstrates that it did not treat members of the plaintiff class in a uniform manner. Plaintiffs rely heavily on a variety of forms given to potential retirees that lists benefits available in retirement. GM notes that these forms were often produced at local facilities, and do not contain uniform information. The forms vary over both time and location. Moreover, according to GM, many of the documents do not contain

the compelling language concerning lifetime health care benefits on which plaintiffs rely. GM makes the same argument concerning information given to potential retirees in oral form. Plaintiffs argue, and I agree, that the information supplied to potential early retirees was consistent on key points.

GM's position is flawed for several reasons. First, it argues that the claims of the early retirees are highly individualized and, thus, not susceptible to resolution through class action. But in the same breath, GM also claims that it never promised *any* early retiree that his or her health care benefits would be cost-free during retirement. GM cannot have it both ways. Because it argues that no early retirees, between the years 1974 and 1988, were ever promised lifetime health care benefits without cost as an inducement to early retirement, its defense against plaintiffs' claims is uniform. Likewise, the claims made by the early retirees are uniform.

GM also argues that the witnesses plaintiffs produced at trial do not fairly represent the class as a whole. Representing the class of some 50,000 early retirees are 451 individuals. Three hundred and eighteen of these retirees fall into subclasses (1) or (2). During the discovery and class formation process, I suggested that discovery be limited to a random sample of 100 retirees. That sample was subsequently enlarged to 200 cases. Thereafter I permitted plaintiffs to add 251 self-selected class representatives, so that the total number became 451. GM was ordered to produce the personnel files of all 451. The self-selected retirees also filed affidavits with the court during pretrial proceedings. Of the 318 individuals from this group in subclasses (1) and (2), 145 were randomly selected; 173 were self-selected. Although plaintiff class presented numerous early retiree witnesses from the group of 318, none of them were randomly selected members of that group. Because of this, GM argues plaintiffs failed to present class-wide proof. I disagree.

As a group, the 318 individuals are representative of their respective subclasses and the class as a whole from the standpoint of the typicality and commonality of their claims, and from the standpoint of GM's action on grounds generally applicable to the class. Those who testified are representative of the class in terms of facilities in which they worked, time-frame, and types of early retirement. Moreover, plaintiff class does not rely exclusively on the testimony of their witnesses. Much of the documentary evidence comes from the personnel files of randomly selected retirees, as well as other sources. Finally, GM failed to produce any significant rebuttal evidence to demonstrate that the treatment of plaintiffs' witnesses was atypical.

GM confuses the class-wide proof necessary for plaintiffs to prevail with the construct of the class itself. I am satisfied that all of the requisites of Rule 23(b) are met and that decertification is not appropriate.

I also deny GM's request to restrict the class to those individuals who retired before December 11, 1987. The announcement on which GM relies accompanied a memo addressed to U.S. Personnel Directors dated December 11, 1987. (Defendant's Exhibit (Def. Ex.) 598.) The memo instructs the Directors to reproduce the announcement locally and distribute it to salaried employees. GM offered no evidence as to when or if this was actually done. Furthermore, the announcement, which does not mention health care until the third of four pages, does not contain detailed information. It merely indicates that deductibles and co-payments will be added, without any specifics. More important, the key date for class membership is not the actual date of retirement, but the date on which the statements of acceptance were signed. *See Seward v. B.O.C. Div. of General Motors Corp.*, 805 F.Supp. 623 (N.D. Ill. 1992) (once statement of acceptance signed, employee could not refuse retirement).

Having certified the class, it is now necessary to determine whether the proof presented on behalf of the class preponderates in its favor. This requires an analysis of that proof, which follows in this opinion.

V. HISTORY OF HEALTH CARE AND EARLY RETIREMENT BENEFITS

Before discussing specific information given to early retirees concerning their health care benefits in retirement, I will briefly describe the historical development of both health care benefits and early retirement at GM.

A. *Health Care Benefits*

Prior to 1961, GM's salaried retirees were eligible for continued health care coverage, but only if they paid the full cost of the monthly premium. In 1961, the Corporation began paying one-half the cost of retiree health insurance premiums. (Tr. XII(B) at 35-36, Sherman.) And in 1964, GM assumed the "full cost of the basic hospital and medical expense coverages" for its salaried retirees.[4] (Def. Exs. 557, 558.) Surviving spouses of deceased retirees were allowed to continue coverage, but at their own expense, until GM began to pay the "full cost" for them in 1968. (*Id.*; Def. Ex. 565 at Exhibit A, pp. 4-5.) At the time of the 1964 changes, the basic health care program required a deductible or co-payment (the greater of $5 or 10% of the charge) for some "Class II" services, such as X-rays, electrocardiograms, and certain cancer treatments. (Def. Ex. 500 at 12.) In 1968, deductibles for outpatient services, except for psychiatric care, were eliminated. (Def. Ex. 565.)

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[4] Retirees who retire "voluntarily" (under provisions of the GM Retirement Program not requiring the Corporation's consent or approval) and who do not meet certain age and length of service requirements were, and continue to be, ineligible for health care coverages in retirement unless they pay the full cost of the premiums.

Throughout the history of GM's health care program, some types of medical expenses incurred by employees and retirees have not been covered by the basic health care program. GM offered salaried employees and retirees an optional supplemental health insurance program, the Comprehensive Medical Expense Insurance Program (CMEIP), to cover some of these expenses. Program participants were covered for such services as doctor's office visits, blood work and ambulance service. (*See, e.g.*, Def. Ex. 505 at 16.) However, they were required to pay at least part of the premium for these coverages, in addition to co-payments and deductibles. (*Id.*)

GM added prescription drug coverage to its basic health care program in 1969. A $2 co-payment was required. (Def. Ex. 565 at Exhibit A, p. 6.) Prescription drug coverage was expanded to include retirees in 1971. (Def. Ex. 568.) The co-payment was raised to $3 in 1976 (Def. Ex. 577 at Exhibit D, p. 3) and again to $5 in 1984 (Def. Ex. 593 at Exhibit F, p. 5).

In 1974, GM first offered dental coverage to its active salaried employees. (Def. Exs. 569-571.) It was extended to retirees in 1977. (Def. Exs. 575-577.) From the outset, covered dental services have required a co-payment of 15 to 50%, depending on the type of procedure utilized. (*See, e.g.*, Def. Ex. 569 at Exhibit A, pp. 9-10.)

In 1977 hearing aid coverage was offered to both active and retired employees; and vision coverage was offered to active employees, then extended to retirees in 1980. (Def. Exs. 575-577 and 581-583.) Vision coverage included "flat dollar co-payments" for both active and retired employees. (*See, e.g.*, Def. Exs. 575 at 7, 506 at 16-17.)

GM instituted a major revision of its health care program in 1985 when it became fully self-insured and established the "Informed Choice Plan." (Def. Exs. 591 and 593.) Under the Plan, participants were given the option,

where available, of Traditional coverage, or a Preferred Provider or Health Maintenance Organization (PPO or HMO). The Traditional option operated almost identically to the insurance plan previously made available to employees.

In 1988 GM announced the modifications to its health care program that are the subject of this dispute.[5] (Def. Exs. 762, 763.) In a booklet entitled "New Dimensions in your GM Salaried Compensation Policies and Benefits," dated January, 1988, GM announced "Revisions to the Health Care Program which include increased employe cost-sharing and elimination of vision and hearing aid coverage, as well as expansion of covered medical services and increases in certain benefit maximums." (Def. Ex. 762 at 1.) The program amendments, effective March 1, 1988, added comprehensive deductibles and co-payments for Traditional option coverages (but not for the PPO or HMO options). Participants became responsible for an annual $200 individual or $250 family deductible for covered services. After the annual deductible, participants were responsible for 20% of the cost for most covered services, up to a maximum of $500. Annual out-of-pocket expenses for Traditional option participants could be as high as $700 for an individual, or $750 for a family. Several other changes were announced at the same time. For example, vision and hearing aid coverages were eliminated, although they were made available again in May 1988, retroactive to March 1, 1988, through CMEP, (Def. Ex. 764), and then restored into the basic health care coverages effective March 1989. (Pl. Ex. 63.) Changes were also made to CMEP. Deductibles were increased, chiropractic and allergy coverages were elimi-

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[5] As of 1987, GM also eliminated the term "insurance" from its program. Thus, CMEP became known as CMEP, and basic coverages fell under the rubric of the GM Health Care Program for Salaried Employees.

nated, and psychiatric coverage was reduced. (Def. Ex. 762 at 19.)[6]

B. *Early Retirement*

Effective February 1, 1974, GM created a new form of retirement called "special early retirement." (*See* Def. Ex. 601, "General Motors Retirement Program for Salaried Employes.") Before and after the development of special early retirement, several other forms of retirement were available to GM salaried employees.

In 1968, GM prepared a booklet entitled "Your GM Retirement Program for Salaried Employes in the United States" which describes several retirement options. (Def. Ex. 600). Normal Retirement is generally taken at age 65. Total and Permanent Disability Retirement is available for disabled employees with at least ten years of service. Employees between ages 60 and 65 with ten or more years of credited service can be "retired by GM," or retire under conditions "mutually satisfactory" to both GM and the employee. All retirees in these categories were eligible for full retirement pension benefits. Employees with ten or more years of credited service also had the option of taking voluntary retirement prior to age 65. However, pension benefits were reduced or delayed. Pension benefits were also reduced for those retired by GM (Corporation Option Retirement) between ages 55 and 60.[7]

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[6] Although some benefits were reduced or eliminated, others were improved. For example, hospice care was added as a covered expense, maximum annual benefits for outpatient mental health care were increased, prescription drug coverage was expanded and the list of covered durable medical equipment and prosthetic and orthotic appliances was enlarged, and dental coverage improved. (Def. Ex. 762.) At the same time GM made these changes, it also unilaterally elected to increase retirement income benefits for salaried retirees, thereby alleviating some of the costs to retirees associated with the health care modifications. (Def. Ex. 763.)

[7] Forced retirement for those in this age group required the approval of either the Executive or Finance Committee of GM.

Special early retirement was designed for employees between the ages of 55 and 60 with ten or more years of credited service. The retirement had to be "initiated by the Corporation, in the best interest of the Corporation, and agreeable to the employe." (Def. Ex. 660 at 4.)

The Chairman of the Corporation, R.C. Gerstenberg, issued a letter to Geenral Managers of Divisions, Presidents of Subsidiaries, General Operating Officers, Group Executives, Staff Executives, and Heads of Staff Sections, dated January 10, 1974. (Def. Ex. 609.) The letter concerns changes, as approved by the Board of Directors, to the Retirement Program for Salaried Employes in the United States. "The modifications include . . . liberalized early retirement features. . . ." Chairman Gerstenberg noted that a second Chairman's letter would provide more detailed information on the modifications. (*Id.* at 2.) The follow-up letter, dated January 11, 1974, provides guidelines for the administration of early retirements. (Def. Ex. 610.) It identifies four types of early retirement, Mutually Satisfactory (for ages 60 to 64), Special Early (for ages 55 to 59), Corporation Option (for ages 55 to 64), and Employe Option. For both Mutually Satisfactory and Special Early retirements "a written statement from the employe indicating acceptance of management's recommendation" is required.[8] Special Early retirement "should *not* be imposed against the employe's desires." (*Id.* at 3, 4.) Furthermore,

> Retirement under the special early provisions of the amended Retirement Program may be granted *only* where such retirement is:
>
> 1. Obviously in the best interests of the employing unit and the Corporation;
>
> 2. Recommended by the employing unit to the employe; and

[8] The statement was not required for an employee-initiated Mutually Satisfactory retirement.

3. Agreeable to the employe.

(*Id.* at 3.) To satisfy the first criteria, "normally one of the seven conditions or circumstances listed for [Mutually Satisfactory retirement] would be present." (*Id.*) Those conditions include (1) a decline in the employee's performance, (2) a significant employee health problem, (3) technological obsolescence of the employee's skills, (4) reduction in work force necessary for the employee's operation, (5) reorganization of duties to improve efficiency of the operation, (6) consolidation of activities or a plant closing, and (7) employee on long-term layoff who has reached retirement age with only a remote prospect of reemployment. (*Id.* at 2.)

Chairman Gerstenberg does not mention health care benefits for early retirees. A letter dated January 16, 1974 from Vice President George B. Morris, Jr., addressed to the same group of managers and concerning the same subject, also fails to mention health care directly, though it gives detailed information on pension benefits. (Def. Ex. 611.) It does state that, "The level of retirement benefits and *other benefit plan treatment* under the new special early type of retirement will be the same as for Corporation option retirement at the same age." (*Id.* at 11, emphasis added.) Likewise, the Retirement Program plan documentation does not mention health care. (*See* Def. Ex. 601.)

However, a letter addressed to General Managers, Personnel Directors and Staff Executives dated November 22, 1974 from Vice President Stephen H. Fuller, providing an update of Chairman Gerstenberg's January 11, 1974 letter, reemphasizes the need for mutual agreement for special early retirement, and attaches two sample statements of acceptance. (Pl. Ex. 409.) The letter also instructs personnel directors to carefully inform potential retirees about *all* benefit plans during a personal interview. "Adherence to the above guidelines is consistent with Corporation policy as outlined in the Salaried Policy and

Procedure Manual." (*Id.* at 6.) Fuller attached a checklist of items to be covered during exit interviews:

> The following items must be covered as a minimum requirement for an adequate exit interview:
>
> * * * *
>
> 7. Full explanation of status of employe benefit programs. Employe must be advised as to whether GM will provide coverage and whether employe must make contributions.
>
> * * * *
>
> b. Hospital, Surgical, Medical and Drug Expense Benefits—Basic and Supplemental. Important for employe to know coverage and contribution, if any.
>
> * * * *
>
> Divisions having exit interview forms should review them to insure that the above areas are adequately covered. It is suggested that those divisions not having exit interview forms prepare a suitable form. Consistency and completeness is essential to a proper exit interview.

Fuller attached a similar checklist to an updated version of his letter in 1979. (Pl. Ex. 410.) Richard O'Brien, Vice President of Corporate Personnel, confirmed that company policy required an exit interview for early retirees, and a discussion of health care benefits during that interview. (Tr. VIII(B) at 38.)

Special early retirements continued to be used throughout the 1970's, although most were taken between 1974 and 1976. In 1980 the Profit Improvement Program was announced. (*See* Def. Ex. 618, letter from Chairman T.A. Murphy addressed to General Managers of Divisions, et al.) The goals of the Profit Improvement Program "were to significantly improve our profit position, to reduce our cost substantially. . . . And to reduce our em-

ployment levels as well." (Tr. VIII(A) at 40, O'Brien.)[9] The Corporation hoped to reduce salaried employment, through layoffs and special retirement programs, by ten percent. (*Id.* at 40-41.) The Chairman's letter refers to Stephen Fuller's letter of August 17, 1979 for the administrative guidelines needed to implement reductions in the salaried workforce. (*See* above, Pl. Ex. 410.)

In the midst of a major corporate reorganization[10] in the early 1980's, GM initiated the North American Automotive Organization (NAAO) Placement and Separation Incentive Program. Chairman Roger B. Smith discussed management of human resources in light of the new organizational structure in a memorandum to General Mangers of Divisions, General Operating Officers, Group Executives, Staff Executives, and Heads of Staff Sections dated July 18, 1984. (Def. Ex. 622.) "The Placement and Separation Incentive Program provides for a specified period through December 31, 1984 during which time employes to be displaced will be identified and offered placement elsewhere or separation with certain incentives." (*Id.* at 1.) The Program allowed employees as young as 53 to be placed on layoff status for two years followed by a form of early retirement. The memorandum does not mention health care in the context of early retirement.

On September 13, 1984, Warren Sherman, Director of the Employe Benefit Plans Administration Section, issued a detailed letter containing administrative procedures for implementing the Placement and Separation Incentive Program. (Def. Ex. 624.) The letter was sent to all

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[9] The Morris Memorandum (Pl. Ex. 420) was issued in conjunction with this program. (*See* Section VI(A) below.)

[10] Reorganization of the North American Automotive Organization (NAAO) led to the creation of the Buick-Oldsmobile-Cadillac (BOC) and Chevrolet-Pontiac-Canada (CPC) Groups within the Corporation.

divisional comptrollers and personnel directors. (Tr. XIII(A) at 7-8.) It states that, "Upon retirement, all Health Care coverages will be continued at Corporation expense." Sherman explained the meaning of this sentence as follows:

> That upon retirement the corporation would continue to provide at full cost to the corporation the insurance coverages for health care for these retirees. They had been paying the full cost of the insurance while they were active employees, and upon retirement, the corporation would continue to pay the full cost of their health insurance.

(Tr. XIII(A) at 10.) He also stated that "full cost" refers to the "full premium or subscription charge." He explained that the term "premium" is used by commercial insurance companies; but Blue Cross & Blue Shield uses the term "subscription charge." As a consequence the Corporation tried to avoid either term. (*Id.*)

> In other words, we—the way we provided our health insurance was through a different group of carriers, and they used different terminology, and what we have always meant is that the corporation would provide the full cost of insurance, and so when we used the term "full cost," we were talking about the full cost of the insurance and whether that was insurance that was provided by Metropolitan or insurance that was provided by Blue Cross and Blue Shield. It—it did not mean that we were providing the full cost of reimbursing medical expenses.

(*Id.* at 12.) On cross-examination, Sherman was asked and answered the following:

> Q. I want to take your concept of full cost and ask you this question. There was never anything sent to the employees that described to them how the full cost was computed, was there?

A. An individual employee would not receive such a computation sheet.

(*Id.* at 33.) Sherman's letter also states that, "Health Care coverage will be continued during layoff and retirement according to existing provisions."

In 1985, GM implemented the Employment Security Program. That program allowed operating units to seek corporate authorization to reduce their salaried workforces through special early retirement offers directed exclusively to their employees. (*See* Def. Ex. 625 through 659.) A report to the Executive Committee of the Board of Directors concerning a request by the Chevrolet-Pontiac-Canada Group to use early retirement incentives includes the following comment:

> Presently, the Salaried Layoff Policy is the only mechanism available for reducing headcount. Unfortunately, the policy does not give us the flexibility to lay off longer service employees whose skills, both technical and managerial, may be obsolete and/or do not fit the new strategic direction and culture being established at C-P-C, which are vital to our success. In fact, quite the opposite may be true and we would be forced to part with our more technically skilled, higher potential employes, just the ones we need to close the product gap on our competitors.

(Def. Ex. 631 at 1.)

Warren Sherman mentions health care in at least two letters he addressed to officials of divisions approved for special separation programs. (Def. Exs. 666 and 667.) Sherman states that, "Retirement benefits, insurance continuance and Savings-Stock Purchase Program treatment generally will be accorded these employes as would be under existing provisions for such retirements." He also states that, "All basic Health Care coverages (Hospital, Surgical, Medical, Prescription Drug, Dental, Vision and

Substance Abuse) will be continued at Corporation expense upon retirement according to existing provisions."

Due in part to the large volume of requests from various divisions for early retirement programs, GM adopted the Corporate-Wide Special Separation Program in August of 1986. (Def. Ex. 662.) As with some of the Employment Security Programs, the plan utilized early retirement offers for selected employees age 53 and over, and "separation incentives" for those under 53. (*See* Def. Ex. 661 at 1.) One goal of the Corporate-Wide Special Separation Program was to reduce the number of salaried employees through early retirement by 4,590. (*Id.*) The Program relied on forms of early retirement (Mutually Satisfactory and Special Retirement) already in existence, with one modification: Pension benefit reductions for outside earnings were eliminated. (*Id.* at 2.)

Following approval of the Corporate-Wide Special Separation Program, William P. MacKinnon, Vice President for Personnel Administration and Development Staff (PAD), issued a letter to all Personnel Directors providing "information concerning the program's intent, content and application from an administrative standpoint." (Def. Ex. 664, cover letter.) As with previous retirement programs, MacKinnon emphasized the need for agreement of both the Corporation and the employee evidenced by a signed writing. (*Id.* at 5.) Mackinnon warns that, "The process of making [retirement] offers by line supervisors will require great tact and sensitivity, and the Executive Committee has asked the Personnel Function to take a leadership role in preparing such supervisors for this crucial sensitive role." (*Id.* at 9.) Finally, the letter attaches several sample "long-form" statements of acceptance.

Warren Sherman also prepared an administrative procedures document for the Corporate-Wide Special Separation Program in 1986. (Tr. XIII(A) at 13-14; Def. Ex. 668.) As with the earlier programs, Sherman did not be-

lieve the Special Separation Program amended the health care plan.[11] The administrative procedures document includes the following:

> All basic Health Care coverages (Hospital, Surgical, Medical, Prescription Drug, Dental, Vision and Substance Abuse) will be continued at Corporate expense upon retirement according to existing provisions.

Effective October 1, 1987, GM's Retirement Program for Salaried Employees was amended in order to comply with changes in federal tax law. (*See* Pl. Ex. 401; Tr. XIII(B) at 35, Hodgin.) GM could no longer offer early retirement to selected employees within a particular age group; all employees within that group had to be made the same offer. Thereafter, GM periodically amended the Retirement Program to include an early retirement option for employees within particular age groups for specified periods of time ("windows"). Retirees were still required to agree to early retirement and to sign a statement of acceptance. (Tr. XIII(B) at 37.)

VI. SUMMARY OF EVIDENCE CONCERNING INFORMATION GIVEN TO EARLY RETIREES

Plaintiffs rely on numerous benefit summaries given to members of the plaintiff class, and oral statements made to them shortly before they decided to retire. This section summarizes the evidence concerning information on health care supplied to early retirees.

Plaintiffs' Exhibit 4 is a compendium of 64 documents describing benefits in retirement that were received by members of the sample group of 318 subclass (1) and (2) early retirees. (*See* Section IV, above.) Most are

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[11] Thelma Lauderbaugh, who worked with Sherman in preparing the administrative guidelines for early retirement programs in the 1980's, (Tr. XIII(A) at 52-64), also stated that she never intended to create any special health care program for early retirees when she worked on special separation programs. (Tr. XIII(A) at 67.)

explanations of benefits clearly designed for distribution to potential retirees. Others are interview checklists or memoranda directed to personnel staff. A few are letters written to individual retirees by personnel representatives. Plaintiffs' Exhibit 2 summarizes the content of these documents, and includes a list of retirees from the representative group who received each item.

Before agreeing to the admission of Plaintiffs' Exhibit 2, GM argued that it summarizes inadmissible hearsay evidence. The exhibit includes excerpts from the documents contained in Exhibit 4, as well as a list of sample group retirees who allegedly received each document. The list of retirees is based in large part on out-of-court statements made by the retirees, and submitted to the court in the form of affidavits. The list also relies on documents found in the retirees' personnel files, and on witness testimony.

I find that the information contained in Plaintiffs' Exhibit 2 is reliable. Although the out-of-court statements made by retirees indicating that they received these documents are technically hearsay, the circumstances provide adequate guarantees of trustworthiness for their admission. Not only were the statements made under oath, but the retirees were able to produce copies of the documents from their own files. Furthermore, in many cases admissible corroborating evidence is available to support their claims. For example, many of the documents retirees claim to have received were also found in the personnel files of randomly selected retirees. In other cases, testimony established that a particular document was regularly used during pre-retirement exit interviews.

Finally, the nature of a large class action requires that evidence concerning individual class members be consolidated and abbreviated where possible. Although plaintiffs could have produced any particular declarant with relative ease, there are limits to the amount of detailed informa-

tion on individual class members that can or should be heard during a single trial. Twenty members of the plaintiff class did testify. Furthermore, GM withdrew its objection (provided the exhibit be used only to show receipt of the documents) after I proposed that plaintiff class be given an opportunity to call additional witnesses in support of the exhibit. (Tr. XVIII(A) at 40.)

The following summarizes the information contained in Plaintiffs' Exhibits 2 and 4, in addition to testimonial and other documentary evidence.

A. *The Morris Memorandum*

Plaintiffs' Exhibit 4-11, entitled "Some Important Considerations in Making a Decision Regarding Special Early and Mutually Satisfactory Retirement," is an attachment to a letter prepared by George Morris, GM Vice President of Industrial Relations. (Pl. Ex. 420.) The letter is dated May 2, 1980 and is directed to General Managers, Personnel Directors and Staff Executives. In the letter, Morris discusses implementation of the Profit Improvement Program which included an early retirement component. Morris instructs those receiving the letter to reproduce the attachment locally and provide copies to prospective retirees.

The attachment includes two sections, "Monthly Retirement Income," and "Other Benefit Considerations." The first contains general information on pension benefits. The second begins with the following:

* Full basic health care coverages for the retiree and eligible dependents are continued for life at no cost to the retiree, including:

  —Hospital, surgical, medical, drugs

  —Dental

  —Vision (starting 10-1-80)

—Hearing aid

* Major medical coverage is continued for a small monthly contribution.

The document also discusses life insurance benefits, the the Savings-Stock Purchase Program, the Employe Stock Ownership Plan, and product discounts.

Twenty-nine sample group retirees from a wide range of facilities recieved this document, or a revised version of it. Nine of them testified at trial: Edmond Burnside, who retired from AC Delco on September 1, 1980; Carl A. Gabrielson, who retired from Central Office in Detroit on September 1, 1980; James T. Bruce, who retired from Detroit Diesel Allison on October 1, 1980; Leonard Moeller, who retired from the Fisher Body plant in Flint on April 1, 1982; John Lockwood, who retired from North American Vehicles Overseas (NAVO) on July 1, 1983; O. David Nelson, who retired from Delco-Remy in Olathe, Kansas on July 1, 1986; Margaret Greenan, who retired from the Central Office public relations department in Detroit on February 1, 1987; Brainard Kugler, who retired from Central Office in Detroit on June 1, 1987; and Roger E. Hunt, who retired from Truck and Bus—Pontiac on September 1, 1987.

Before he retired, Carl Gabrielson received a packet of information concerning early retirement at his Detroit office. It included both the attachment to the Morris memorandum ("Some Important Considerations"), and a statement of acceptance of special early retirement ready for signature. (Tr. II(B) at 60.) Gabrielson testified that he discussed health care benefits in retirement with his supervisor after he received the packet. He was told that he would have health care for his lifetime at no cost. (Tr. II(B) at 61.) Nevertheless, Gabrielson admitted that he understood that the phrase "no cost" did not mean he would not have some out-of-pocket expenses. He knew that he would have to pay something for vision

and dental care if he opted for services beyond the basics. (*Id.* at 74-75.)

James T. Bruce received both the Morris memorandum, (Pl. Ex. 420), and its attachment, (Pl. Ex. 4-11), in connection with his retirement. (Tr. VII(A) at 5, 7.) He believed the Morris Memorandum reflected an amendment to the health care program for early retirees. (*Id.* at 26.) He also knew that the program was not entirely free; and that he would have to make "minimal payments." (*Id.* at 15.)

Leonard Moeller took special early retirement from the Fisher Body plant in Flint, Michigan in 1982. At a meeting with a personnel representative before his decision to retire, he asked specifically about health care. He was told that he would have the same benefits for his lifetime as he had while an employee. (Tr. VII(A) at 41.) When he signed his statement of acceptance, he assumed the phrase "benefits applicable to me" contained in the statement referred to the whole benefits package, including health care. (*Id.* at 44.) According to Plaintiffs' Exhibit 2, Moeller also received "Some Important Considerations." However, he did not mention it during his trial testimony.

John Lockwood retired from the North American Vehicles Overseas (NAVO) division of GM in Detroit on July 1, 1983 at age 55. He received a copy of "Some Important Considerations," and signed his statement of acceptance afterwards. (Tr. XIV at 6, 9; Pl. Ex. 150(b).) At the time he received the document, he "considered [it] a concise summary of what GM had always promised all of its salaried retirees." (*Id.* at 10.) When questioned about whether anyone discussed the meaning of the statement in the document concerning health care, Lockwood stated: "I believe that I had known about this type of thing for a long time. This had always been General Motors' policy, and I believed that it was their intent to

carry it out forever, ... I'm not sure that there was any particular discussion over it. It's quite self-explanatory." (*Id.* at 18.)

O. David Nelson received "Some Important Considerations" at the time of his retirement. Mr. Nelson was the plant manager at the Delco-Remy battery plant in Olathe, Kansas. Before his own retirement, his job required him to personally speak with approximately six potential early retirees concerning their benefits in retirement. (Tr. III(B) at 17.) Although he did not provide them with copies of "Some Important Considerations" (some of the interviews took place before the document was written), he did tell them "that the benefits that they then had would continue and that there would be basically no increase in the cost to them for their lifetime. . . ." *Id.* at 18.

Richard O'Brien, Vice President of Corporate Personnel, testified that the Morris Memorandum was issued in conjunction with the Profit Improvement Program which had the goal, among others, of reducing the number of employees by ten percent. (Tr. VIII(A) at 42.) O'Brien held numerous positions at the corporate level in the personnel and benefits areas over his long tenure with GM, and probably reviewed the Morris Memorandum before its release. (Tr. VIII(A) at 41.) He explained references to health care contained in the memorandum's attachment as follows:

> [T]hat referred to the health care benefits for the retiree and—and eligible dependents, that it would be covered for their lifetime as opposed to being cut off at one point in time. For example, many companies cut off benefits at age 65 when Medicare kicked in. This is an indication that those benefits would be continued for their—for their lifetime.

(*Id* at 43.)

> ["No cost"] referred to the fact that the corporation paid the premium for health care for the coverage in place. It didn't mean that the employee had no costs because under most of our plans, for example, under the basic plan—basic health care, the employee did pay for office visits. The only payment the corporation made was if the employee was hospitalized, then we would pick up that cost. But we would pay the premium. There was no cost sharing by the employee, no premium sharing by the employee.

(*Id.* at 44.)

Charles Ryan, Secretary of the Employe Benefit Plans Committee from 1981 until his retirement in 1992, agreed with O'Brien's interpretation of the Morris Memorandum attachment. (Tr. V(B) at 62-63.) However, be conceded that the phrase "lifetime health care benefits at no cost to you" is ambiguous. (*Id.* at 63.)

Other members of the sample group who received the Morris Memorandum will be discussed below.

B. *Central Office (Detroit and New York)*

Two early retirees from Central Office in Detroit, Margaret Greenan and Brainard Kugler, received revised versions of the Morris Memorandum. (Pl. Exs. 148(p) and 151.) Greenan, who retired on February 1, 1987, received hers from Gerald Samuelian, a supervisor at GM Central Office Personnel. (Tr. XII(B) at 6.) The information concerning health care benefits contained in the document is virtually identical to the original.

Brainard Kugler was a payroll administrator in Detroit Central Office before he took a mutually satisfactory retirement in 1987. He also received a revised version of the Morris Memorandum, (Pl. Ex. 151), from Linda Pechenik during a pre-retirement exit interview. (Tr. XVI(B) at 51.) Together, they went over each point. (*Id.* at 53.) (Pechenik denies that she used this docu-

ment during exit interviews. Tr. XVII at 34.) Kugler made a point to ask Pechenik about health care, because "I wanted to make sure that I'd be covered the same . . . when I was working, that I would be covered when I retired." (*Id.* at 56.) He was told that the health care program would be the same in retirement. (*Id.* at 61.)

Greenan also received a document dated November 12, 1986, apparently prepared especially for her, entitled "Financial Planning." (Pl. Ex. 4-61) Under the heading "Health Insurance" it states:

> Your health care benefits will not change upon retirement, except with the additional medicare coverage available at 65 years of age. It would be advisable to continue CMEIP Coverage. Retiree contributions would increase from $1.20 per month to $3.00 per month, for single coverage.

Policy	*Current*	*Retirement*
1) Basic Health Care		
Policy	GM	GM
Covered	Margaret	Margaret
Premium	GM assumes	GM assumes
Eligible	For life	For life

Provides basic health care benefits.

At the time of Greenan and Kugler's retirements, Linda Pechenik worked in "the benefits area" at the General Motors Central Office. (Tr. XV(A) at 18.) In 1986 and 1987 she assisted her supervisor, Jerry Samuelian, with early retirement interviews. (*Id.* at 19.) According to Pechenik, once a list of employees to whom GM was willing to offer early retirement had been prepared, the employees were given a document entitled "General Motors Corporate-Wide North American Special Separation Program," and asked to sign a statement of acceptance. (*Id.* at 21; Def. Ex. 697.) The seven-page document includes

descriptions of a wide range of benefits, including health care. It states, "All basic Health Care coverages (hospital, medical, prescription drug, dental, vision and substance abuse) will be conitnued at Corporation expense upon retirement." It also notes that "General Motors Corporation reserves the right to amend, change or terminate the Programs described." Greenan admitted that she had seen and studied this document before she retired, but only because she made a copy of it when it "passed over her desk." She denied that she was ever given a copy by Pechenik or anyone else in personnel. (Tr. XVII at 10, 22.)

Pechenik testified that during retirement interviews she was occasionally asked about "guarantees of any future [health care] programs." (Tr. XV(A) at 30.) She told employees that "[s]alaried workers would pretty much piggy-back off" the benefits received by hourly employees, and that these benefits were renegotiated every three years. "I would tell them very specifically I could only attest to what was currently in effect, that as the next contract was approved, benefits were subject to change." (*Id.*)

Pechenik denied that she ever used "Some Important Considerations" during the retirement interviews she conducted. (*Id.* at 33.) Finally, she stated that it was her practice to provide every retiree she counselled with a copy of "Your Benefits in Retirement." (*Id.* at 32.) Kugler claims that he did not receive the brochure "Your Benefits in Retirement" until after he retired. (*Id.* at 57.) (For a discussion of this booklet, see subsection W, below.)

Central Office retirees received a variety of other documents discussing health care. Joseph Fox, who retired on May 1, 1980, received "Your Benefit Plans in Retirement." (Pl. Ex. 4-16.) This one page document states, "Blue Cross/Blue Shield-Dental-Hearing Coverages[:] GM pays the premium for you and your covered dependents for your lifetime." Fox received a second, untitled one-page

document. (Pl. Ex. 4-17.) Under the heading "Health Care Coverages," it states, "BC/BS will be continued at GM expense." It also notes that Fox is eligible to continue coverage under the Comprehensive Medical program, and that the dental plan will be continued at GM expense.

Six members of the representative group who retired from Central Office in Detroit received a two-page document entitled "Insurance and Medical Coverages After Retirement." (Pl. Ex. 4-8.) Under the major heading "Medical Insurance," and sub-heading "Blue Cross/Blue Shield and Prescription Drug Programs," it states, "Your basic coverages will be provided at Corporation expense for your lifetime. . . ." All six retirees also received at least one other document described in this section.

Robert H. Bickmyer, who retired from Central Office on October 1, 1986, received a multi-page document entitled, "Draft of Special Separation Program," dated June 19, 1986. (Pl. Ex. 4-47.) Under the heading "Health Care, Dental and Vision," it states that, "Upon retirement, all health care coverages will be continued." This document also includes the following disclaimer:

> This summary presents general information only. Any reference to the payment of benefits is conditioned upon your eligibility to receive benefits. Each of the benefit programs has its own terms and conditions which in all respects controls the benefits provided.

Bickmyer also received a personalized one-page document describing layoff and retirement benefits. (Pl. Ex. 4-48.) The document indicates that GM will pay Blue Cross/Blue Shield "for lifetime" at "no cost to retiree." Last, Bickmyer received "Basic Benefit Increases after Retirement." (Pl.Ex. 4-10.) This one-page document indicates that medical insurance (Blue Cross/Blue Shield) will be "continued without cost to you." Frank Laurenzo and Rocco Ruggiero, both of whom retired from Central Office—New York (Overseas Operations) on March 1,

1982 and July 1, 1979, respectively, also received this document.

In addition, Laurenzo received a document entitled "Explanation of Benefits." It includes a chart describing his benefits in special early retirement. (Pl. Ex. 4-30.) The chart indicates that "GM pays full cost for lifetime" for Blue Cross/Blue Shield Medical Insurance once Laurenzo retires. The text of the document also states, "Your basic coverages [Blue Cross/Blue Shield and Prescription Drug] will be provided at Corporation expense for your lifetime".

Dario Z. Breata, who retired from Central Office—New York on September 1, 1979, received a similar document and chart. (Pl. Ex. 4-7.) As with Plaintiffs' Exhibit 4-30, it indicates that "GM pays full cost for Lifetime" for medical insurance. Three other New York Central Office 1979 retirees, including Rocco Ruggiero, also received this document. One of these individuals, William G. Cooney, received an even more abbreviated chart, (Pl. Ex. 4-9), indicating that GM pays for Blue Cross/Blue Shield during retirement.

C. *General Motors Assembly Division (GMAD)*

(1) *South Gate Assembly.* Two of the documents contained in Plaintiffs' Exhibit 4 were given to early retirees of the South Gate assembly plant in California. The first, entitled "Employees Laid Off Who Will Retire From Layoff," (Pl. Ex. 4-1), was received by two South Gate retirees from the sample group of 451—Clinton Burns, who retired April 1, 1974, and Donald Nesbit, who retired November 1, 1980.[12] (Pl. Ex. 2 at 1.) It is a one-page summary of benefits, indicating that basic health insurance will be paid by GM for the "lifetime" of the retiree.

[12] As an example of corroboration of the evidence contained in Plaintiffs' Exhibit 2, I note that although direct evidence that Burns received this exhibit is available only through his affidavit, a copy of the document was found in the personnel file of Nesbit.

Clinton Burns received a second one page document. (Pl. Ex. 4-2.) It includes information on pension benefits, layoff payments, life insurance and health care, stating that, "Your basic health insurance is paid up for you and your spouse for the rest of both of your lives."

Additional evidence concerning what early retirees were told about health care at the South Gate plant was received through the testimony of Walter F. Huppenbauer. Huppenbauer worked in salaried personnel administration at South Gate for many years before his retirement in 1981. Beginning approximately in 1960, he assumed a supervisory position in salaried personnel administration for the plant. (Tr. II(A) at 5-7.) Huppenbauer began processing early retirements when they were first introduced in 1974. (*Id.* at 9.) He estimates that he conducted a hundred or more pre-retirement interviews during his tenure at the plant. (*Id.* at 10.) He consistently told potential retirees "that they were going to get their basic health insurance for the rest of their life free and that they could continue comprehensive for a modest fee. . . . [W]e told everybody that." (*Id.* at 15.) However, on cross-examination, Huppenbauer also stated that the health care benefits he described to early retirees were no different than those given to general retirees. In other words, early retirees, according to Huppenbauer, were not offered a special health care deal. (*Id.* at 30, 47-48.)

Huppenbauer also testified that Plaintiffs' Exhibit 4-2, received by Clinton Burns, was a form used for all early retirees during the first wave of early retirements in 1974. (*Id.* at 17.) Huppenbauer created the form in conjunction with staff from salaried payroll. In the normal course of business, the form would have been reviewed by the divisional office for GM Assembly. (*Id.* at 18.) Plaintiffs' Exhibit 4-1, according to Huppenbauer, was used for early retirees who were offered retirement during the second wave of special early retirements in 1979. (*Id.* at 23.)

GM submitted a 1982 document entitled "Your General Motors Status and Your GM Benefits in Connection with

the Discontinuance of Operations at GM Assembly Division South Gate Plant." (Def. Ex. 732.) Other than the existence of the document, no evidence indicates that it was received by any potential retirees. It includes the same information on health care, and the same disclaimer as found in Defendant's Exhibit 731, discussed immediately below.

(2) *Fremont Assembly.* Armand Petrolina retired from the Fremont Assembly Plant in California effective April 1, 1986, after being placed on layoff when the plant closed in 1982. He received a brochure entitled "Your General Motors Status and Your GM Benefits In Connection With The Discontinuance of Operations at the GM Assembly Division Fremont Plant." (Pl. Ex. 4-42; Def. Ex. 731.) It states, "Health Care coverages are continued for you and your eligible dependents for your lifetime, with General Motors paying the full cost if you are receiving Salaried Retirement Program benefits." It also includes the following disclaimer:

> This summary presents general information only. Certain provisions summarized herein are subject to approval by the Internal Revenue Service.
>
> Any reference to the payment of benefits is conditioned upon your eligibility to receive benefits. Each of the benefit programs has its own terms and conditons which in all respects controls the benefits provided. The full details of your benefits are included in the language of the various programs. The benefit programs have been summarized in an employe booklet, "Your GM Benefits", and brochures entitled "The Renewed Commitment" and "The Continuing Commitment", previously distributed to you. Additional copies are available upon request.

(Def. Ex. 731 at 1.)

(3) *Van Nuys Assembly.* Eleven of the retirees from the representative group of 451 who worked at an assem-

bly plant in Van Nuys, California received a document summarizing their retirement benefits.[13] (Pl. Ex. 4-3.) The form includes a space for entering the individual's monthly pension benefits, in addition to a list of other benefits available in retirement. It states: "Blue Cross or Kaiser—Employee covered at no cost to employee." Retirees who received this information took retirements effective between Dcember 1, 1974 and September 1, 1982.

Plaintiff class supplemented the evidence on Van Nuys retirees through the testimony of Anne Glick. Glick worked in salaried personnel at the Van Nuys plant until 1980. Although she was not directly responsible for processing early retirements, she was asked by her supervisor to assist with pre-retirement interviews in 1979. (Tr. III(A) at 7.) She was instructed to hand retirees personalized versions of Exhibit 4-3 (same as Pl. Ex. 109(c)) and to "tell them that whatever was on this sheet is what they are entitled to in their retirement for the rest of their lives at no expense to them." (Tr. III(A) at 11.) Glick personally conducted only seven or eight retirement interviews. (*Id.* at 25.) Although she pointed out the statement concerning health care during these interviews, she admitted that none of the retirees asked any questions about it. (*Id.* at 26.)

M. Scott Pruyn retired from the Van Nuys plant the year before Anne Glick was asked to assist with early retirement interviews. He was the personnel director at the plant from 1969 until his disability leave in 1977. (Tr. III(A) at 45.) He testified that early retirements came in two waves, the first in 1974, the second in 1977. Both were associated with decreases in production at the plant. His subordinates conducted most of the retirement interviews; however, he personally spoke with two individuals.

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[13] Not all of these individuals received an identical form. For example, the forms of five retirees refer to dental insurance, the others do not. However, all forms include the same language concerning Blue Cross or Kaiser coverage.

(*Id.* at 54.) He told retirees that they would continue to have the same health care program they had as employees as long as they lived, at no cost to them. (*Id.* at 56-57.) When asked how he knew this information to be true, the witness stated, "That was General Motors' policy. . . . I was told that was General Motors' policy from practically every personnel director that I worked for before I became one." (*Id.* at 57.)

(4) *Oklahoma City Assembly*. Finally, the personnel file of Lionel Brace, one of the randomly selected individuals who retired from an assembly plant in Oklahoma City on May 1, 1983, includes a handwritten document dated September 14, 1982. At the top of the three-page document the following appears: "*L. Brace*—Early Mut. Sat. Retirement Recap." (Pl. Ex. 4-34.) The document indicates that basic health insurance, dental and vision "continue for self + dependent for life," and that Comprehensive "may continue for life by paying premiums."

D. *Chevrolet—Toledo*

Wayne R. Riedel worked for Chevrolet in Toledo for 39 years before his early retirement in 1980. He worked in the plant's personnel department as supervisor of benefits from 1974 until his retirement. (Tr. IV(A) at 35.) He spoke with many potential early retirees concerning their benefits in retirement in 1974 and 1979. He told them "that their hospital and medical insurance would be paid by the corporation in full, and if they should die first, the full benefit would pass on to their surviving spouse." (*Id.* at 42.) Furthermore, Riedel testified that many of the retirees he spoke with asked questions about health care benefits. (*Id.* at 46.) He understood the phrase "benefits applicable to me" in the statements of acceptance early retirees were required to sign to refer to pension as well as health care benefits. (*Id.* at 51.) However, Riedel did not believe early retirees had rights to health care benefits not shared by general retirees. He

told all retirees the same thing about health care. (*Id.* at 58.) Moreover, he conceded on cross-examination that "paid in full" health care meant that premiums, not necessarily all costs, were paid in full. (*Id.* at 66.)

E. *Chevrolet-Pontiac-Canada Group (CPC)*

In the 1980's, two members of the sample group who worked at Van Nuys Assembly, by then part of the Chevrolet-Pontiac-Canada Group, received brochures associated with the Corporate-Wide Special Separation Incentive Program. Ronald Conrow, who retired on September 1, 1987, received "General Motors Special Separation Incentive Program[:] Classified Below Age 53 with 30 or More Years of Credited Service." (Pl. Ex. 4-51.) The document is dated September 1986, and the title page includes this heading: "Chevrolet Pontiac Canada Group." The personnel file of Carl Brown, who retired April 1, 1986, contains "Your General Motors Status and your GM Benefits Placement and Separation Incentive Program for Bonus Eligible Employees Age 58 or Older at Date of Separation." (Pl. Ex. 4-52.) Both documents indicate that "all health care coverages will be continued" upon retirement.

GM presented a document similar to the one received by Conrow. (Def. Ex. 671.) The title page and much of the information is identical. It, however, includes two additional pages. One is a statement of acceptance. The other contains the same "terms and conditions" disclaimer found in Plaintiffs' Exhibit 4-47 (discussed above in Section VI(B)). GM provided no evidence, other than the document itself, that this version was ever received by a potential retiree.

Brown also received a brochure describing benefits in retirement of which plaintiffs produced only an excerpt. (Pl. Ex. 4-49.) The excerpt is entitled "Section 5—When You Retire," and states, "Upon retirement, under the Mutually Satisfactory provision, all health care coverages will

be continued, at corporation expense." A larger portion of the same document, although still incomplete, appears in the personnel file of James D. Baker who retired from the Tonawanda Engine Plant in Buffalo, New York on April 1, 1987.

The personnel file of Sam D. Emerick, who retired from a Pontiac facility in Jacksonville on January 1, 1987, includes several versions of a brochure discussing the "Special Separation Program." (Pl. Ex. 4-39.) The documents are dated October 1985 and were issued by CPC. They include the standard "terms and conditions" disclaimer found in many documents from this time period. Each also states that, "Upon retirement all health care coverages will be continued."; some add "at Corporation expense."

Seven other members of the sample group received a variation of this document, dated September 1986, designed for the 55 to 59 age category. (Pl. Ex. 4-40.) They retired between December 1, 1986 and January 1, 1988 from a variety of facilities and divisions. The documents include the same information on health care and the same "terms and conditions" disclaimer.

F. *Delco and AC Spark Plug*

Francis Doonan, who worked at Delco Electronics in Milwaukee and retired on August 1, 1977, received two documents describing health care in retirement. The first, is a one-page summary of various benefits available to retirees, entitled "General Data Concerning Retirements." (Pl. Ex. 4-5.) The document begins with a discussion of Blue Cross/Blue Shield. It states, "The Retiree and/or his spouse or eligible dependents are provided with Blue Cross/Blue Shield and Prescription Drug Program coverages without cost for their lifetime. This coverage is the same as for the active employee." As to CMEP, "The Retiree, his spouse, and eligible dependents can be insured for Comprehensive Insurance coverage for their lifetime."

Doonan also received a letter from J.E. O'Loughlan, a supervisor in Benefit Plans Administration. (Pl. Ex. 4-6.) The letter, dated August 4, 1977, informs Doonan that he has been approved for special early retirement. It also states that, "Upon retirement free Blue Cross—Blue Shield coverage (including the Prescription Drug Program) and the new retiree Dental Program will be provided for you and your spouse for your lifetimes. You and your spouse will also be covered under the Comprehensive Medical Insurance Program (Major Medical)."

Wilbur Oakley, who worked at a separate Delco facility, and retired effective July 1, 1975, received an extremely brief document entitled "Health Care Insurance." It states that, "Upon retirement all health care coverages will be continued at corporation expense." (Pl. Ex. 4-4.)

Thomas J. Morr, a defense witness, worked as a salaried personnel representative at Delco Electronics in Kokomo, Indiana from 1972 until 1978. (Tr. IX(B) at 39-41.) When special early retirement was first announced in 1974, management began the process by identifying those to whom they would offer special early retirement. Those individuals were then contacted and urged to schedule a meeting with Morr. (Tr. X(A) at 5.) Morr personally interviewed between 150 and 200 potential early retirees in 1974 in half-hour sessions. (*Id.* at 6.) He developed a checklist which he used during the interviews. The list covered the estimate of monthly pension benefits, taxes, surviving spouse provisions, savings stock purchase program, life insurance and health care. (*Id.* at 7.) He told retirees "that the health care plan that they currently were participating in would be continued when they retire, the—the same plan." Furthermore, he does not recall many questions from retirees concerning health care. "It seemed to be—to be a relatively nominal issue once the —the employee understood that—that following retirement, that he or she would—would have the same plan available." (*Id.* at 9.) The only document given to pro-

spective retirees was an estimate of monthly pension benefits. (*Id.* at 11.) Discussion of health care matters took only a minute or less of the half-hour interview. (*Id.* at 12.) At the end of the interview, those who were interested in early retirement were instructed to schedule a second appointment with Morr. Retirees were asked to sign a statement of acceptance at the second interview. (*Id.* at 13.)

Five members of the sample group (Edmond Burnside, Geraldine Dombrowski, Billie J. Gates, George Hamilton and John Sheppke) who worked at AC Delco facilities in Atlanta, Detroit, Memphis, LaMiranda and Seattle, received two documents that mention health care. All of these individuals retired in 1980. The first is entitled "Retirement Benefits" and includes space for personalized information on various benefits. (Pl. Ex. 4-12.) On the fifth page, under the heading "Health Care Insurance," the document indicates that coverage for basic hospital, surgical-medical and prescription drug "after retirement will be continued at no cost to retiree." The final page of the document, however, includes this disclaimer: "While the information contained in this booklet is believed to be correct, it must be understood that provisions of the related policy or benefit plan shall govern in the event the information proves to be in conflict therewith."

This same group of AC Delco retirees also received a form entitled "Salaried Retirement" (Pl. Ex. 4-13.) On page two, under the heading "Blue Cross-Blue Shield Program or other local Plan Coverage", this appears: "Note: coverage after retirement will be continued at no cost to employee."

Edmond Burnside, Geraldine Dombrowski, and John Scheppke also received the Morris Memorandum.

One member of the AC Delco group, Edmond F. Burnside, who worked at the Atlanta facility, testified at trial. Burnside testified concerning several meetings he had with his regional sales manager, Mr. Schwerzel.

Schwerzel stressed the advantages of free health care benefits in retirement. "This was the big benefit that he preached and preached and preached down here, and I was very insistent on it." (Tr. II(A), p. 54.)

GM submitted an August 1983 document entitled "Your General Motors Status and Your GM Benefits in Connection with the Discontinuance of Certain AC-Delco Operations if You are a Salaried Employee." (Def. Ex. 734.) As with several other documents submitted by GM, no evidence indicates that this document was actually distributed to any early retirees. The document includes a disclaimer similar to the one in Defendant's Exhibit 731, discussed in Section VI(C)(2) above. The retirement section states that "Health Care coverages are continued for you and your eligible dependents for your lifetime, with General Motors paying the full cost. . . ."

Two retirees from AC Spark Plug in Flint received a memorandum from Hazel M. Hanson concerning "Retirement Information." (Pl. Ex. 4-35.) Charles Meyers retired April 1, 1985; Robert Forst retired January 1, 1987. The document begins by stating, "This information is to help answer questions asked by prospective retirees." Under the heading "Basic Hospital, Surgical, Medical and Prescription Drug Expense Coverage," it states, "GM pays for the full cost of coverage for the retiree (other than deferred retirements) and for his eligible dependents. . . ."

G. *Detroit Diesel Allison Division*

Raymond Lucid, who retired from Detroit Diesel Allison on October 1, 1980, received a two-page document entitled, "Retirement Information Sheet." (Pl. Ex. 4-18.) It contains the following under the heading "Insurance Coverages":

> Your company-paid medical insurance coverages remain the same after retirement that you have as an active employee. Blue Cross/Blue Shield, dental,

> vision and hearing aid coverages. Also, you continue your Comprehensive Medical Expense Insurance (the major medical thru Connecticut General) at a cost to you as follows: [list of premiums]

The document also states that, "Benefits under the Retirement Program and company-paid medical insurance coverages continue for lifetime of the spouse, regardless of remarriage."

The personnel files of three Detroit Allison early retirees, Mary G. Franklin (retired January 1, 1987), Ernest Rasmussen (retired June 1, 1987) and Bartlett Cady (retired June 1, 1981), contain a document entitled "Minutes of Retirement Interview." (Pl. Ex. 4-28.) The document is a form designed for check-off of subjects covered. It also includes space for some personalized information, and for the retiree and GM representative to sign and date the form. It indicates that hospital/medical, prescription drug, dental, vision and hearing aid coverages will be provided in retirement "at no cost to retiree." Ronald Lund, who took special early retirement from Detroit Diesel Allison in 1987, also received this document. He stated that a representative from personnel discussed benefits with him, and used this form during the interview. (Tr. IV(B) at 11.) Lund asked the representative about health care. "[S]he responded that definitely we would have the complete program as it stood on that date for as long as we lived." (Tr. IV(B) at 12.)

Mary Franklin also received a one-page document from the Regional Personnel Administration. (Pl. Ex. 4-59.) It includes the following comment on health care coverages: "You will retain this coverage for life." Dental coverage "will continue."

H. *Fisher Body Division*

Three early retirees from Fisher plants in Flint, Michigan, who retired in 1980, 1983 and 1987, received a one-page document describing special early retirement benefits.

(Pl. Ex. 4-19.) The document states that, "Blue Cross/ Blue Shield and dental expense are paid for by corporation for life."

Glyn W. Sadler, who testified at trial, took special early retirement from Fisher-Flint in 1980. He spoke with a supervisor concerning early retirement benefits, and specifically asked about health care because of his wife's severe problems with allergies and asthma. (Tr. III(B) at 60.) In response, he was told "I'd have the same coverage at no cost for me and my wife the rest of my life." (*Id.* at 63.) Furthermore, he was not told benefits could decrease. Indeed, he was told they were likely to improve. (*Id.* at 64.) Finally, he was sent home to discuss retirement with his wife, and to reassure her that her medical bills would be paid. (*Id.* at 65.)

John Abrinko, one of the randomly selected early retirees, retired from the Fisher Body Division in Detroit on March 1, 1982. On March 4, 1982 he received a letter from salaried personnel for the Division. (Pl. Ex. 4-31.) The letter includes the following paragraph:

> Your Blue Cross/Blue Shield and Dental Expense coverages will be continued without cost to you as the Corporation will pay the full cost of this protection subsequent to your retirement. If you predecease your spouse, he/she may continue this insurance without cost under the General Motors Group.

Perry Sanderson was a salaried personnel representative at the Fisher Body Plant in Pontiac, Michigan from 1969 until it closed in 1982. He then transferred to the BOC plant in Lake Orion, Michigan and became a salaried benefits, and later personnel, representative until 1990. Sanderson processed salaried retirements at Fisher Body. (Tr. XIII(B) at 51.) Once special early retirements were introduced, "The process involved the departments contacting their employees that might qualify for a special early retirement, and giving a basic outline of what that involved, and asking the employees if they were interested

in that special early retirement. If the employees expressed an interest, very often they would come to my office in salaried personnel and ask me for more details about retirements." (*Id.* at 52.) He only discussed health care if the employee asked a question, which was rare. (*Id.* at 53, 56.)

> If they asked a question about—it was very rare that an employee would ask about—they had—seemed to have a concern about whether or not their health insurance might stop or be changed at the time of retirement. If—if that concern was expressed to me, I would ensure that them that their—their health insurance would not be changed at the time of retirement that it would continue. But that's the only type of discussion that I would have with them at that time about their basic health insurance.

(*Id.* at 56-57.) If the employee accepted retirement, he would notify his supervisor, sign a statement of acceptance, and then return to Sanderson's office to complete the paperwork. (*Id.* at 53-54.) At this time, the retiree was given a copy of "Your GM Benefits in Retirement." (*Id.* at 57.) However, no version of "Your Benefits in Retirement" was published before November of 1977. (*Id.* at 65.)

I. *General Motors Institute*

Virginia Spencer, who retired from the General Motors Institute in 1980, received a memorandum addressed to the Payroll Department concerning her benefits. (Pl. Ex. 4-20.) It indicates that Blue Cross/Blue Shield, vision and dental expense coverages will be paid through retirement.

J. *Harrison Radiator*

Frank Disinger, who retired from Harrison Radiator in 1980, received a document entitled "Information Regard-

ing GM Benefits for Salaried Retirees." (Pl. Ex. 4-21.) It includes the following:

> *HEALTH CARE COVERAGES*
>
> Blue Cross—Blue Shield,—Prescription Drug Program and Hearing Aid Plan,—The Corporation continues to pay full contribution for the retiree, spouse and eligible dependents. . . .
>
> Dental Care Plan—Corporation continues to pay full contribution for retiree, spouse and eligible dependents.
>
> * * * *
>
> Comprehensive Medical Expense Insurance—coverage may be continued for the retiree, spouse and eligible dependents providing the retiree makes the required contributions. . . .

K. *Hydramatic/Powertrain Division*

Several early retirees from the sample group took retirement from a Hydramatic Division plant in Ypsilanti, Michigan between 1980 and 1985. Five of them received a one-page document entitled "Estimated Retirement Benefits." (Pl. Ex. 4-22.) The document indicates that Blue Cross/Metro will be paid by GM. The personnel file of one of these individuals also contained a sheet entitled "Salaried Retirement Exit Interview." (Pl. Ex. 4-32.) The form states, "Blue Cross-Blue Shield—paid by G.M. for Retiree and Eligible Dependents throughout retirement."

As a salaried personnel representative at the Powertrain [14] plant in Warren, Michigan, Linda Denner processed early retirements between 1980 and 1990. (Tr. V(A) at 80.) She discussed health care during retirement interviews. (*Id.* at 82.) Once departmental managers selected employees to be made an early retirement offer, Denner gave pension estimates, without any additional information

[14] During a mid-1980's reorganization, Hydramatic became part of the Powertrain Division.

on other benefits, to potential retirees. If interested, employees were asked to sign a statement of acceptance and make an appointment with her. Employees were given "Your GM Benefits in Retirement" at this interview, and required to complete necessary paperwork. (Tr. V(B) at 9-11.) She briefly reviewed various sections of the booklet. Afterwards, she told employees "to read this from front to back and come back to me with any specific questions you might have." (*Id.* at 11.) However, she did not point out the disclaimer language in those booklets to retirees. (Tr. V(A) at 88.) She told retirees "that they would have health care coverages just like they have as a regular active employee. That nothing would be changing drastically." (Tr. V(B) at 15.) She processed approximately 200 retirements between 1980 and 1988. Only about ten percent of retirees had questions about health care; and of these most asked about dependent coverage. (*Id.* at 17-19.) Denner agreed that "all the benefits under the special early program . . . included health care." (*Id.* at 21.)

L. *Packard Electric*

Five early retirees from the sample group who retired from various Packard Electric facilities received a personalized sheet of information concerning retirement benefits from Thomas C. Habel. (Pl. Ex. 4-24.) Habel was the supervisor of benefits for the Packard Division before his retirement, and had worked in salaried benefits for many years. (Tr. X(A) at 53.) Two of the retirements involved are from 1980; the other three are from 1986 and 1987. The documents state:

> During retirement, you and your eligible dependents will continue to have the same health care program you enjoy today, with the following exception(s):
>
> *No Exceptions* [*added by hand*]
>
> The only expense to you will continue to be your share of the Comprehensive Medical Expense Insur-

ance Program which we have already arranged to have deducted from your Pension Check (If you are enrolled).

In the event of your death, your surviving spouse woud be enrolled in Her/His own name for the same hospitalization program.

Thomas J. Morr was Director of Salaried Personnel at Packard Electric Division from 1984 until 1988. (Tr. IX(B) at 33.) At trial, he was questioned about this document. He testified that he did not regard this language "as accurate because to say the only expense you'll continue to have would be comprehensive is not accurate because you have co-pays for things like prescription drugs, and you have deductibles and—and co-pays associated with the comprehensive, you have co-payments associated with psychological care, co-payments in dental, co-payments in—in vision and—and in hearing. So there are other expenses beyond what's stated here." (Tr. X(B) at 5-6.) Nevertheless, Morr conceded that it is reasonable to conclude that the form was used at Packard Electric for seven or eight years. (*Id.* at 8.)

M. *Parts Division*

Two individuals from the Parts Division of General Motors received an extremely brief summary of benefits in the early 1980's. (Pl. Ex. 4-25.) It is entitled "Special Early—Mutually Satisfactory Retirement," and notes that "Hosp/Surg/Med/Drug Dental Vision (eff 10/1/80)" will be "Fully paid by GM."

N. *Saginaw Steering Gear Division*

The personnel files of thirteen members of the representative group (including nine randomly selected individuals), who worked for the Saginaw Steering Gear Division, include a "Retirement Interview" form. (Pl.Ex. 4-26.) The individuals involved retired between 1980 and 1988. This one-page document indicates that Blue Cross, hearing aid, dental, and vision care will be "Provided by GM" for seven of the thirteen individuals. The

remaining six files indicate that the benefits will be "Paid for Life by General Motors," or "Paid by GM for life."

O. *Central Foundry Division*

Retirees from the Central Foundry Division received a variety of documents discussing retirement benefits. A "Salaried Retirement Interview Checklist," (Pl. Ex. 4-27), was found in the personnel files of four retirees from this Division. Meredith Robinson retired from the Modular Iron Foundry in Saginaw on September 1, 1986. Thomas Wiegandt retired from the Division on April 1, 1988 after taking special leave on September 1, 1987. Trafton Abbott, one of the randomly selected retirees, retired September 1, 1987. Thomas Cahape, also randomly selected, retired July 1, 1981. The document has several pages. Under the heading "Basic Hospital, Surgical, Medical and Prescription Drug Expense Coverage," it states, "GM pays for the full cost of coverage for the retiree (other than deferred retirements) and for his eligible dependents. . . ." Gary Snyder, a salaried personnel administrator at the Saginaw Malleable Iron Plant (Central Foundry Division), testified that this form was used as a checklist during early retirement interviews from at least 1978 until late 1986 or early 1987. (Tr. V(B) at 67.) The Morris Memorandum, (Pl. Ex. 4-20), was also used during the 1980/81 time frame. (*Id.* at 70.)

Meredith Robinson also received a document describing "the Special Central Foundry Retirement Program as approved by the Corporation." (Pl. Ex. 4-53.) It describes the plan as follows:

> Under the plan, selected employes between ages 55 and 60 may be eligible to retire. Retirement must be initiated by GM and must be agreeable to the employe.
>
> The highlights of the plan include:
>
> * Unreduced pension benefits commensurate with the employes' years of service.
>
> * * * *

> * Conitnued health care coverage during retirement.

In addition to the interview checklist discussed above, Thomas Wiegandt's file includes a multi-page "Retirement Checklist." (Pl. Ex. 4-64.) Under the heading "Group Health Care," it states, "Basic hospital, Surgical, Medical, Prescription Drug[:] GM will pay the full cost of H.S.M.P. for retirees." This form also includes the following disclaimer:

> This summary presents general information only. Any reference to the payment of benefits is conditioned upon your eligibility to receive them. Each of the benefit programs has its own terms and conditions which in all respects control the benefits provided. The full details of your benefits are included in the language of the various programs.

Gary Snyder personally used this form during early retirement exit interviews. (Tr. V(B) at 72.) However, he conducted "relatively few" of these interviews himself. (*Id.* at 66.) Snyder also told employees that GM would continue to pay health care insurace premiums or their equivalent, not all costs associated with health care. (*Id.* at 5-6, 11-12.) In other words, he told employees that "the mere fact of their retirement did not alter their current health care, and we—that it just continued on, and GM would continue to pay that premium or that—that cost of the insurance going into retirement." (*Id.* at 18.) Snyder testified that retirees were also given "Your GM Benefits in Retirement" during exit interviews. (*Id.* at 19.)

Snyder also stated that a document entitled "Your General Motors Status and Your GM Benefits in Connection with the Discontinuance of Operations at Central Foundry Division Saginaw Nodular Iron Operations" (Def. Ex. 741) was given to Nodular Iron plant employees eligible for early retirement before that facility closed. (*Id.* at 23.) It contains a lengthy disclaimer which includes the following sentence: "Because General Motors

reserves the right to amend or terminate its benefit plans and to amend its employment policies, your actual benefit entitlement may be affected by future plan amendments." (*See also* Def. Exs. 738 and 740.)

P. *Terex Division*

Two members of the sample group who took early retirement from the Terex Division received two different versions of "Your General Motors Status and Your GM Benefits Following the Sale of the Terex Division." (Pl. Exs. 4-29 and 115(d); Def. Ex. 729.) Walter Lampert, a plaintiff class member who testified, received this document, (Pl. Ex. 115(d)), in the fall of 1980 shortly after he was told the Terex Division would be sold. (Tr. VI(A) at 39-40.) At page 21 of the document, this appears: "Health care coverages are continued for you and your eligible dependents for your lifetime with GM paying the full cost, if you are receiving salaried retirement program benefits. . . ." Lampert understood this to mean that the "coverage then in existence would continue for the lifetime of myself and my spouse." (Tr. VI(A) at 41.) On the back of Lampert's personal copy of this brochure he took notes from a meeting held to discuss special early retirements with a group of Terex employees. According to his notes, the Director of Sales for North and South America made the following comment: "Look at your health benefits, continued for life and worth a fortune." (Pl. Ex. 115(d); Tr. VI(A) at 42-45.) This document, however, also includes the same "terms and conditions" disclaimer found in Plaintiffs' Exhibits 4-47, in addition to the following:

> The full details of your benefits are included in the language of the various programs. The benefit programs (except as otherwise may be modified in the following pages to apply to employes affected by the sale of TEREX) have been summarized in an employe booklet, "Your GM Benefits", previously dis-

tributed to you. An additional copy is available upon request.

Another Terex Division early retiree, Ed Plivelich, who retired effective November 1, 1984, received a similar document with the same title. (Pl. Ex. 4-29.) It includes the same language on health care. Plivelich's personnel file included a two-page document entitled "Estimated Retirement." (Pl. Ex. 4-50.) It states that health care, prescription drug, vision care, and dental will be "continued for life at no cost to employee." (Three other individuals, who retired from a Chevrolet-Pontiac-Canada-Group plant in Parma, Ohio in 1986 and 1987, also received this form. (*See* Pl. Ex. 2 at 54).

Lampert and a third employee, Norman O. Davis, received a one-page document entitled " 'Memo Items' Retiree Benefits." (Pl. Ex. 4-33.) It indicates that Blue Cross/Blue Shield, Dental Plan, Vision Care, and the Hearing Aid Plan will be continued for life at no cost to the retiree.

Q. *Buick Motor Division*

In the early 1980's several members of the representative group retired from the Buick Motor Division in Flint. Three of them received a one-page "Retirement Estimate." (Pl. Ex. 4-14). The top of the form includes space for individualized pension benefits. The lower half discusses other benefits. Under the heading "Hospital-Surgical-Medical-Drug" it states, "Your present coverage will be continued on a Corporation paid basis."

Six Buick Motor Division retirees, including one who also received the "Retirement Estimate," received a one-page document entitled, "Additional Information." (Pl. Ex. 4-15.) The form includes the same information on health care coverages as the "Retirement Estimate."

Two individuals who retired a few years later (Carlin Belville in 1985, and Thomas Stephens in 1986) also

received a form entitled, "Additional Information." (Pl. Ex. 4-58.) This form appears to be an updated version of the earlier document. Under the sub-heading of "Hospital-Medical-Surgical-Drug-Hearing Aid," it states, "Coverage continued on Corporation paid basis." The same sentence appears under the heading, "Dental Insurance and Vision Insurance." CMEP is "continued by pension deduction."

R. *Buick-Oldsmobile-Cadillac Group (BOC)*

Several members of the representative group retired from Buick-Oldsmobile-Cadillac Group facilities in the late 1980's. A BOC memorandum from Gretchen K. Soutear, Director—Salaried Personnel, dated October 24, 1986 was received into evidence. (Def. Ex. 670.) The document discusses administrative procedures for the Special Separation Program. Soutear instructs her readers to use information packets attached to her memorandum during separation discussions with employees. The attachments include six brochures directed to various categories of employees, all dated September 1986. The first discusses mutually satisfactory and normal retirements for employees age 60 to 64 and 65 to 69. The second concerns employees age 55 to 59 (those eligible for "Special Retirements"). It states, "Upon retirement, all health care coverages will be continued at Corporation expense." (Def. Ex. 670 at Bates stamp 005119.) The third attachment is directed to employees age 53 to 54. It includes two sections, one discussing benefits during leave, the other discussing benefits during retirement. The retirement section includes the same language on health care as above. The fourth and fifth documents concern employees ineligible for one of the retirement programs. The final document concerns employees below age 53 with thirty or more years of credited service. These employees were eligible for voluntary retirement under the terms of the general retirement program, and were offered a lump sum

monetary payment as an incentive to take voluntary retirement. As with the other brochures, the document states, "Upon retirement, all health care coverages will be continued." These attachments also contain the "terms and conditions" disclaimer found in Plaintiffs' Exhibit 4-47 (discussed Section VI(B), above).

Four of the representative group, Jerome Nosal, who retired from the Fleetwood plant in Detroit on May 1, 1988, Edna Burns and Thomas Loftin, both of whom retired from a plant in Wentzville, Missouri in 1989 and 1988 respectively [15], and Charles Smith who retired from the Flint plant in 1986, all received some version of the attachments to Defendant's Exhibit 670. (Pl. Exs. 4-43, dated April 1986; 4-44, dated September 1986; and 4-46, dated April 1986). All three contain language concerning health care and a disclaimer virtually identical to that quoted above.

The personnel file of Daniel Spencer, who retired from a BOC assembly plant in Lordstown, Ohio in 1986, contains a multi-page document entitled, "Your General Motors Status and Your GM Benefits Placement and Separation Incentive Program for Bonus Eligible Employes, Age 53-57 at Date of Separation." (Pl. Ex. 4-45.) It states that "all health care coverages will be continued"; but does not include the "terms and conditions" disclaimer.

Finally, N.P. Wuest, who retired from a BOC plant in Lansing, Michigan effective September 1, 1987, received "an information packet for those taking the Special Incentive Separation and retiring under the Early Voluntary

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[15] Some retirement dates are beyond the cut-off date for this class due to the fact that these employees agreed to retire before March 1, 1988. During the mid-1980's early retirements were offered to many employees below the age of 55. However, these employees were required to take layoff until they reached ther 55th birthday. As a consquence many employees with late retirement dates actually left their jobs well before the class cut-off date.

provisions of the Salaried Retirement Program." (Pl. Ex. 4-57, Memorandum to Special Separation Program Retirees from Mike Sweeney dated January 28, 1987 with attachment.) The descriptive material includes the "terms and conditions" disclaimer and the following, "Upon retirement all health care coverages will be continued at Corporation expense."

Perry Sanderson worked as a salaried personnel representative at a BOC plant in Lake Orion, Michigan from 1982 until 1990. (Tr. XIII(B) at 51, 57.) He processed retirements at that facility during the Corporate-Wide Special Separation Program. Potential retirees were first approached by their department heads. If they had questions, they would come to him. (*Id.* at 58.) Interested employees would then sign a statement of acceptance and meet with him again to sign the final papers. Generally health care was not discussed. But there "seemed to be some concerns by some employees that at the time of retirement they would either lose their health insurance or it would be altered in some way by the fact of their retirement. And whenever I would get that question, I would assure them that their retirement would not have any effect on their health insurance." He did not tell them that their health care coverages would be the same for their lifetimes. (*Id.* at 59-60.) Most retirees received "Your Benefits in Retirement" at the time they signed their final papers. Sanderson processed between 100 and 150 salaried retirements between 1982 and 1987. (*Id.* at 62.) He believed that the special separation program did not change health care benefits. (*Id.* at 61.)

S. *Electronic Data Systems (EDS)*

In a memorandum from J.L. Lewandowski and R.F. O'Brien, dated January 17, 1985, directed to "Personnel Directors—U.S. Operations," they discuss "Additional Questions and Answers Regarding Administration of Poli-

cies and Benefits Applicable to Eligible Employes Electing Not to Remain with EDS." (Pl. Ex. 4-37.) Under the heading "Insurance Coverages," the following question and answer appear:

> Q. What specific insurance coverages will be provided during furlough and retirement?
>
> A. The following insurance coverages will be provided at GM expense during furlough and retirement:
>
> —Basic Group Life Insurance (2 × annual salary as of December 31, 1984);
>
> —Health care (hospital, surgical, medical, dental, vision, prescription drugs, hearing aid) coverages will be provided during retirement. The same coverages, except dental, will be provided during furlough (dental will be reinstated upon retirement). If an employee chooses certain HMO's under the Informed Choice Plan, employe contributions may be required.

Beatrice Kirley and Orvil Summers, both of whom retired February 1, 1987, received this document. Kirley worked for the BOC (Buick-Oldsmobile-Cadillac) plant in Janesville, Ohio. Summers worked for the Truck and Bus Division in St. Louis.

Steven J. Horvath, an EDS eligible employee who testified at trial, also took early retirement at this time. He retired effective February 1, 1987 from the Electromotive Division in LaGrange, Illinois after a two-year furlough. He received several documents discussing benefits in conjunction with his decision to retire. One five-page document, co-signed by William P. MacKinnon, Vice President Personnel Administration and Development Staff (GM), and Kenneth G. Riedlinger, Senior Vice President (EDS), discusses options available to GM employees who do not want to transfer to EDS. (Pl. Ex. 111

(b); Tr. V(A) at 39.) The information was effective as of January 1, 1985. The document discusses three categories of employees, those age 58 and older, those age 53 to 57, and those under age 53. Horvath was in the second category. The document offers first and second category employees Mutually Satisfactory retirement, or furlough followed by Mutually Satisfactory retirement. It includes the following paragraph:

> In accordance with provisions of GM Group Life and Health Care Insurance Programs applicable to laid-off or retired employees, GM Basic Life Insurance (including Extra Accident and Survivor Income Benefit Insurance) and noncontributory health care coverage would be provided during the furlough period, and after retirement, except dental coverage would not be available while you are on furlough, and you could continue Optional Group Life Insurance, Dependent Group Life Insurance, Comprehensive Medical Expense Insurance Program and Sponsored Dependent Health Care Insurance coverages by making required contributions.

Horvath also received, and discussed in detail with a personnel representative, "Your General Motors Status and Your GM Benefits Placement and Separation Incentive Program for Bonus Eligible Employees Age 53-57 at Date of Separation." (Pl. Ex. 111(c); Tr. V(A) at 45.) The document is identical to Plaintiffs' Exhibit 4-45, discussed in Section V(F) above.

Horvath signed a Statement of Acceptance of Special Early Retirement, (Pl.Ex. 111(d)), at the end of his furlough. (Tr. V(A) at 49.) At that time he was given two pages of information on various benefits. (Pl. Ex. 111(e).) Under the heading "Hospitalization, Surgical-Medical Insurance Coverage," one page states, "You'll continue the same hospital/medical-surgical benefits in retirement you had as an active employe even if it is an HMO. The cost, of course, is entirely paid for by the

Corporation." Dental, vision and hearing aid are also continued during retirement and "paid for by the Corporation." Horvath understood this to mean that the premium would be paid throughout his retirement, and that the level of health care coverages would remain the same. (Tr. V(A) at 72.)

Horvath also received a copy of a memorandum addressed to "Personnel Directors—U.S. Operations from J.L. Lewandowski (General Director Personnel Administration) and R.F. O'Brien (General Director Employe Benefits)," dated January 17, 1985. (Tr. V(A) at 43.) It addresses "Additional Questions and Answers Regarding Administration of Policies and Benefits Applicable to Eligible Employes Electing Not to Remain with EDS." (Pl. Ex. 111(g).) Among the "insurance coverages" that "will be provided at GM expense during . . . retirement" are "Health care (hospital, surgical, medical, dental, vision, prescription drug, hearing aid) coverages . . ."

Finally, Horvath testified that he spoke with three separate administrators about health care in retirement. (Tr. V(A) at 46.) One told him that "I would maintain the health insurance and the life insurance at GM expense, and in—fact, his comments were along the line of, 'It's a real nice thing, and you don't have to worry about anything.'" (*Id.* at 47.)

T. *Engineering*

The personnel files of three individuals from the sample group, who worked in engineering in Detroit, include a "Summary of Benefits." (Pl. Ex. 4-38.) Joseph Renvez retired December 1, 1986. Albert Abbo retired May 1, 1987. Frank Caito retired June 1, 1985. The form states, "BC/BS will be continued at GM expense (includes hearing aid program.)" The Dental Plan is also continued at GM expense. In addition, Renvez received a document directed to employees between the ages of 55 and 59. (Pl. Ex. 4-41.) It states:

You will be offered a Special Retirement effective no later than December 1, 1986. The following provisions would apply during the period of your retirement: . . .

4. *Health Care, Dental and Vision*

Upon retirement, all health care coverages will be continued. You may continue Comprehensive Medical Expense Insurance Program (CMEIP) coverage by having the applicable contribution deducted from your retirement checks.

U. *New Departure Hyatt Bearings Division*

Joseph Miller, who retired from the New Departure Hyatt Bearings Division on August 1, 1986, received a one-page document entitled "Retirement." (Pl. Ex. 4-54.) It states:

HOSPITALIZATION AND SURGICAL/MEDICAL COVERAGE

Under present provisions of the retirement program —Full basic health care coverages for yourself and eligible dependents are continued for life at no cost to you including:

—Hospital, Surgical, Medical and RX Drugs

—Dental

—Vision

—Hearing Aid

E.M. Chacko, who retired from New Departure Hyatt on December 1, 1987, received "Your General Motors Status and Your GM Benefits Following the Phase—Out of Commercial Bearings Operations at New Departure Hyatt Division Bristol Operations Sandusky Operations."

(Pl. Ex. 4-60.) The document includes the following disclaimer:

> The summary presents general information only regarding benefits and policies in effect on the date the summary is prepared. Any reference to the provision of coverages or payment of benefits is conditioned upon your eligibility for such coverages or benefits. Each of the benefit programs has its own terms and conditions which in all respects controls the coverages or benefits provided. The full details are included in the lanuage of the various programs. The summary is not intended to and does not create any contractual obligations. General Motors reserves the right to amend or terminate programs.

In the section of the document addressed to employees age 60 or older, it states, "Upon retirement, all health care coverages will be continued." Similar information, also with "terms and conditions disclaimer," can be found in Defendant's Exhibit 727, "Your General Motors Status and Your GM Benefits Following the Discontinuance of New Departure-Hyatt Bearings Division Clark Plant Operations." (*See also* Def. Ex. 737.)

V. *Truck and Bus Group*

Five members of the sample group who worked for a Truck and Bus plant in St. Louis, and retired in 1987, received a one-page "Benefit Review." (Pl. Ex. 4-63.) Two of these indivaduals, Ellis W. Cook and Henry Knight testified at trial. The document states, "As a retiree, you will receive the same health care coverage that you now receive." The document also states in capital letters at the bottom: "For more detailed information, refer to your GM benefit handbook."

Henry Knight worked for the St. Louis plant for almost 35 years, and held numerous supervisory positions throughout the plant. (Tr. IV(A) at 4.) The plant closed on September 1, 1987. At a mass meeting two years be-

fore this event, Knight, along with other supervisors, was told of the planned closing. (*Id.* at 5.) In return for agreeing to stay with the plant until the end, the supervisors were promised they would be offered special early retirement at a later date. (*Id.*) Approximately six months before the plant closed, Knight attended two meetings designed to provide supervisors with information on special early retirement. Approximately a dozen future retirees attended each meeting. (*Id.* at 8-9.) At the first, Knight was given the "Benefit Review" discussed above, and told to examine it carefully. (Pl. Ex. 4-63 and 113(a); Tr. IV(A) at 10.) At the second meeting, Knight specifically asked about health care benefits. He wanted to know if anything would be taken away. He was told to consider his past experience as an employee during which time he received "full medical benefits." The plant personnel director then read from a booklet, stating that, "your health benefits will be paid by General Motors for your lifetime at no cost to you." (*Id.* at 12.)

Ellis W. Cook attended a special early retirement meeting held by Gussie Green of the plant's personnel department, along with five or six other employees. (Tr. IV(B) at 34-35.) Several attendees were concerned about medical benefits, and asked Green about them. She told everyone "that we would receive our medical benefits the rest of our life at no cost to us." (*Id.* at 36.) Cook was given the same information on health care at a second meeting with a different personnel representative. (*Id.* at 38-39.)

Roger Hunt, a quality engineer for a Truck and Bus facility in Pontiac, Michigan, took early retirement in 1987. He received a version of the Morris Memorandum (Pl. Ex. 156(a)) from the staff head for his department before he signed his statement of acceptance. (Tr. XVI (B) at 26-27.)

Hunt also received a three-page document entiled, "Benefit Information for Classified Salary Retiree." (Pl.

Ex. 156(c)). It states that hospitalization coverage will be "continued after retirement at no cost to retiree." The document was given to him by Norma Sparkman [16], "the divisional coordinator for the special early retirees," during a meeting attended by 15 to 25 early retirees. (Tr. XVI(B) at 29-30.) At the meeting, Sparkman read aloud to the group from the document. (*Id.* at 31.) Based on this document and other information given to Hunt, he understood "that there would be no changes in the health care benefits for the remainder of my lifetime at no cost to me." (*Id.* at 32.) Sparkman also gave him a copy of "Your Benefits in Retirement" at this meeting. (*Id.*; Def. Ex. 507.) And Hunt "studied it." (*Id.* at 40.)

Finally, Hunt received a brochure entitled "What you should know about your Benefits." (Pl. Ex. 156(d).) It was given to him "in an assembly-type meeting sometime after" he signed his statement of acceptance. (Tr. XVI(B) at 33). The document addresses both general and early retirements. It includes several pages of information on various benefits. Under the heading "Benefit Program Coverages After Retirement," it states:

> With the exception of voluntary retirement with less than 85 points, all other types of retirement provide:
>
> —Full earn-out of GM's contributions under the savings-stock purchase program;
>
> —Health care coverages provided at GM's expense for lifetime;
>
> —Under Informed Choice Plan, you will continue to have the opportunity to make an annual election
>
> —Paid-up life insurance.

Six members of the sample group, who retired from various Truck and Bus facilities in 1986, 1987 and 1988,

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[16] Norma Sparkman worked directly under the supervision of Robert Hodgin, discussed below. (Tr. XIII(B) at 20.)

received a three-page document providing "Benefit Information" for retirees. (Pl. Ex. 4-55.) It states that hospitalization coverage (Blue Cross/Blue Shield) will be "continued after retirement at no cost to retiree." Vision care and dental coverage are also "available for retirees and eligible dependents at no cost to retiree."

Bobby Upchurch, who retired from Truck and Bus—Pontiac on November 1, 1987, received this document in addition to one directed to employees between the ages of 53 and 54, offering them a special leave of absence followed by special retirement. (Pl. Ex. 4-62.) Section II of that document is entitled "When You Retire." It states, "Upon retirement, all health care coverages will be continued." William Wessinger, who retired from the Proving Ground in Milford effective July 1, 1988, also received this document.

As an administrative engineer for Truck and Bus Operations in Pontiac, Michigan, Kenneth J. Titherage was responsible for personnel matters within the engineering department. (Tr. II(B) at 29-30.) Titherage processed retirements within his department from 1974 until the date of his own early retirement in 1987. (Tr. II(B) at 30.) Hundreds of individuals retired during this time period. (*Id.* at 31.) Retirement information was conveyed to employees through a variety of means, including one-on-one conversations and group meetings conducted by representatives from divisional personnel. (*Id.* at 32.) Titherage stated that about half of potential retirees asked about health care in retirement. They were concerned about the possibility of increased health care costs. He told them that "health care would continue in retirement, as we had been accustomed to it during working days, and at no cost to the employee." (*Id.* at 33-34.)

Titherage personally spoke with two of the seven sample group retirees who received a three page document containing benefit information, (Pl. Ex. 4-55): Robert Pickett,

who retired November 1, 1987; and Helen White, who retired January 1, 1987. (Tr. II(B) at 36.) Titherage also received essentially the same document from divisional personnel when he retired. (Tr. II(B) at 36; Pl. Ex. 170.) The document states that hospitalization coverage will be "continued after retirement at no cost to retiree." Pickett and White asked about health care, and were told by Titherage that they would receive the same type of health care and dental coverage in retirement as they had while working, at no cost to them. (*Id.* at 37.) Titherage relied on information he received from divisional personnel staff during human resources meetings. (*Id.* at 38.) He believes that the changes made to the health care program in 1988 are "in direct conflict with what I had been told personally and what I had told employees that had asked me that question." (*Id.* at 39.) However, Titherage also did not believe that early retirees received any special deal for health care. Rather, he understood that normal retirees would receive the same health care benefits; and he gave them the same information about health care given to early retirees. (*Id.* at 41, 46.)

Robert Hodgin was manager of employee benefits for Truck and Bus from 1982 until 1991. (Tr. XIII(A) at 77.) That position involved "the general administration of all employee benefits, both hourly and salary, for the Truck and Bus Group." Kenneth Titherage attended at least one meeting conducted by Hodgin on September 5, 1986 to discuss implementation of the early retirement program with staff representatives. (Tr. XIII(B) at 19; Pl. Ex. 343.) Titherage and other staff representatives were instructed to act as a focal point of information for questions from employees on the early retirement program. (Tr. XIII(B) at 21; Pl. Ex. 343.)

Hodgin processed early retirements during his tenure at Truck and Bus, mostly in 1986/87. Potential early retirees were first given information on early retirement at mass meetings. Hodgin often accompanied staff heads to

meetings with eligible employees under their supervision. "[W]e would go through and explain to them the outline of the program, what it consists of, who it affected, in general what the benefits were." Health care was discussed in a cursory fashion. Employees were told it was "available as a part of their retirement." (Tr. XIII(A) at 83.) Hodgin does not recall use of the term "lifetime" in connection with health care benefits. (Tr. XIII(B) at 8.) According to his recollection, "in the group meetings and then in the one-on-one meetings, the bulk of the discussion dealt with the monthly retirement benefit that the individual received, and health care was not a—an issue at all." (*Id.* at 9.) Moreover, when asked whether or not health care coverages could be changed, "[t]he response generally went along the vein that it could be changed, either improved or some, you know, items taken away." (*Id.*)

At the conclusion of the mass meetings, employees were provided with a pension estimate. Interested employees were then required to sign a statement of acceptance. (Tr. XIII(A) at 84.) Subsequently, some retirees met with Hodgin individually, others in groups. The meeting "would consist of sitting down with an employee and going through their various benefits that they would receive under the retirement program, what their eligibilty was under the stock program or their options, what their options were under the health care program, and then process paperwork which they were required to sign in order to institute the retirement." (*Id.* at 79.) When available, employees were given a copy of "Your GM Benefits in Retirement." (*Id.* at 81.) If, after the second meeting, an employee were to conclude that retirement was not for him, according to Hodgin, he would have been allowed to withdraw his statement of acceptance. (Tr. XIII(B) at 45.)

Hodgin believed that health care benefits were the same for both general and early retirees. (*Id.* at 82.) "Health care in retirement was no different at that time than health

care as an active employee, and health care applied to retirements regardless of whether there was a window or an early voluntary or a regular retirement. There was no differentiation as to the type of health care. Health care was health care." (Tr. XIII(B) at 44.)

Finally, Hodgin testified that closing documents were prepared whenever Truck and Bus plants were closed or sold during this time period. (*See, e.g.*, Def. Exs. 735 and 736, "Your General Motors Status and Your GM Benefits in Connection with the Discontinuance of Operations at Truck and Bus Group"; Tr. XIII(B) at 4.) Defendant's Exhibit 735, which is dated January 1985 and is approximately 40 pages long, is addressed to employees at the Dallas Truck Center, and the St. Louis, Pittsburgh and Boston Zone Offices. It describes transfer, layoff and retirement options available to employees whose jobs will be discontinued. The document includes the following disclaimer:

> This summary presents general information only regarding benefits and policies in effect on the date the summary is prepared. Any reference to the provision of coverages or payment of benefits is conditioned upon your eligibility of for such coverages or benefits. Each of the benefits programs has its own terms and conditions which in all respects controls the coverages or benefits provided. The full details are included in the language of the various programs. The summary is not intended to and does not create any contractual obligations. General Motors reserves the right to amend or terminate programs.

(Def. Ex. 735 at 1.) In the retirement section, the document also states: "Health Care coverages in effect at retirement are continued for you and your eligible dependents for your lifetime, with General Motors paying the full cost if you are receiving Salaried Retirement Program benefits. . . ." (*Id.* at 23.) According to Hodgin, policy required

all salaried employees at closing operations to receive documents similar to Defendant's Exhibits 735 and 736. (Tr. XIII(B) at 5).

W. *Summary Plan Descriptions*

GM argues that the documents described above are of no significance. Of all the information provided to early retirees, GM argues that only the summary plan descriptions (SPDs)—booklets entitled "Your GM Benefits" and "Your Benefits in Retirement"—which were distributed to all active and retired employees are appropriate sources for determining the terms of the plan. I also relied on these booklets for my holding that general retirees are not eligible for vested health care benefits. *See Sprague v. General Motors Corp.*, 768 F.Supp. 605 (E.D. Mich. 1991).

ERISA requires employers to provide each employee with a "summary plan description of any employee benefit plan." 29 U.S.C. § 1022(a)(1). The SPD must be "written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." *Id.* Among other things, the SPD must include information on "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b).

In 1965 GM issued a brochure entitled "The General Motors Insurance Program." (Def. Ex. 500.) The document is directed to salaried employees and includes information on various insurance programs, including health care. It states that "GM will pay the full monthly premium or subscription charge for your basic Hospital, Surgical and Medical Expense coverages" if you retire. (*Id.* at 18.) On the last page, the following disclaimer appears:

> General Motors believes wholeheartedly in this Insurance Program for GM men and women, and ex-

> pects to continue the Program indefinitely. However, it reserves the right to modify, revoke, suspend, terminate, or change the Program, in whole or in part, at any time, except as limited by the provisions of the Group Contracts, or their supplements, and the provisions of any applicable Federal or state laws.

The 1968 and 1971 versions of the booklet, (Def. Exs. 502, 503), include essentially the same information.

In 1966 GM issued the first version of "Your GM Benefits." (Def. Ex. 501). It states that, "General Motors pays the full cost of your Blue Cross and Blue Shield or other equivalent coverages, and you pay the cost of the Supplementary Plan" if you retire. (*Id.* at 8.) The booklet refers the reader to other booklets, such as "The General Motors Insurance Program," for more detailed information. A "terms and conditions" disclaimer is included:

> This booklet presents general information only and is designed to give you a broad picture of some of the advantages of working with General Motors—the added values that are so important to you and your family. Any reference to the payment of benefits is conditioned upon your eligibility to receive them. Each of these programs has its own terms and conditions which in all respects control the benefits provided.

(*Id.* at 3.)

In 1974 GM issued "Highlights of Your GM Benefits: A Handbook for Salaried Employees in the U.S." (Def. Ex. 504.) The following disclaimer appears in small print:

> This booklet presents general information only and is designed to give you a broad picture of some of the added values of working with General Motors. Any reference to the payment of benefits is conditioned upon your eligibility to receive them. Each of these

> programs has its own terms and conditions which in all respects control the benefits provided.

(*Id.* at 3.) The section devoted to hospital and medical benefits does not mention benefits in retirement. However, in a section devoted to retirement this appears: "Hospital-Medical Coverages: Your basic coverages will be provided at Corporation expense for your lifetime (except for voluntary retirement between ages 55 and 60 when combined years of age and credited service total less than 85.)" (*Id.* at 29.)

A revised version of "Your GM Benefits" was issued in 1977. (Pl. Ex. 27.) It includes the same disclaimer (more prominently displayed), and the same information on health care in retirement. GM also issued its first version of "Your Benefits in Retirement" in 1977. (Pl. Ex. 28.) It contains an abbreviated disclaimer in the front: "Each of the benefit plans has its own terms and conditions which in all respects control the eligibility and payment of benefits mentioned." (*Id.* at 3.) An additional disclaimer appears in the health care section: "GM health care coverages have been changed from time to time through the years and are subject to change in the future." This section also states that, "Your basic health care coverages will be provided at GM's Expense for your lifetime. . . ." (*Id.* at 11.)

Revised versions of both "Your GM Benefits" and "Your Benefits in Retirement" were issued in 1980. (Pl. Exs. 29 and 30.) They include the same disclaimers and the same information on health care.

Both were revised again in 1985. (Pl. Exs. 31 and 32.) These versions include a more explicit disclaimer: "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet." (Pl. Exs. 31 at 1, 32 at 1.) The information on health care coverages in "Your GM Benefits" is un-

changed. (Pl. Ex. 31 at 45.) The booklets were not revised again until after March 1, 1988.

VII. ANALYSIS

I find that over a fourteen-year period, from 1974 to 1988, GM entered into contracts with its early retirees which vested in the retirees and their spouses certain health care benefits for their lifetimes at no cost to them. Put another way, GM contracted to provide early retirees in subclasses (1) and (2) with the same level of health care benefits for their lifetimes, without cost shifting, that they enjoyed as employees prior to retirement. These early retirement agreements are enforceable under ERISA as independent bilateral contracts, or as modifications of GM's health care benefit plan.

Having made that basic finding, I will restate the claims of the parties and detail my reasons. The early retirees [17] which form the plaintiff class have stated a claim for relief under ERISA, "where, as here, an employer allegedly agrees, apart from its regular plan, to provide a discrete group of employees with vested health care benefits in exchange for defined consideration." *Sprague v. General Motors Corp.*, 768 F.Supp. 605, 612 (E.D. Mich. 1991). Welfare benefits, of which health insurance is one, 29 U.S.C. § 1002(1)(A), do not automatically vest. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1297 (6th Cir. 1991). However,

> the parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated. In construing such agreements, courts may draw inferences or make presumptions as this court has done in construing collective bargaining agreements providing welfare benefit plans.

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[17] The terms "early retirees," "plaintiffs," and "plaintiff class" are used interchangeably.

In re White Farm Equipment Co., 788 F.2d 1186, 1193 (6th Cir. 1986); *accord, International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 301 (6th Cir. 1991). Furthermore, the agreement to vest welfare benefits need not be explicit. *International Resources* at 301; *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 95 (3rd Cir. 1992).

Plaintiff class argues that unreduced health care benefits are part of an early retirement offer made to them by GM, and that in exchange for this consideration they agreed to leave their jobs. The early retirees must prove their claims by a preponderance of the evidence. As juries are so often instructed, that requires a finding that their claims are more likely true than not true.

A. *Did GM contract with the early retirees?*

Plaintiff class relies on the statements of acceptance that early retirees signed as evidence of a contract. GM maintains that the statements of acceptance are not contractual in nature, but are mere indicators of the retirees' intent to retire.

The statements of acceptance came in two basic forms —the short-form and long-form—with numerous minor variations. (*See* Pl. Ex. 3.) The short-form was first introduced in 1974, and used regularly until 1984. In conjunction with the Corporate-Wide Special Separation Program, the long-form statement of acceptance was introduced in 1984.

With minor variations, each of the statements of acceptance indicates that the early retiree has "reviewed the benefits applicable" to him or her and "accepts them." Following is an example of a typical short-form:

Statement of Acceptance of
Special Early Retirement

Management has discussed with me the possibility of retiring under the Special Early Retirement provisions of the General Motors Retirement Program for Salaried Employees. I have evaluated the benefits applicable to me under the provisions of the Program and am agreeable to accepting Special Early Retirement effective ——. I understand that implementation of this retirement is subject to the necessary approvals.

Signed: ————

Date: ————

(Pl. Ex. 3 at 1-1.) A typical long-form statement of acceptance includes the following:

STATEMENT OF ACCEPTANCE
OF SPECIAL RETIREMENT

Management has discussed with me the option of continuing my employment with General Motors or accepting an immediate special retirement under the Special Retirement provisions of the General Motors Retirement Program for Salaried Employees. I have evaluated the benefits applicable to me under the provisions of the General Motors Corporate Wide Special Separation Program and have decided to accept them. My retirement will be effective ——, 19—

I am satisfied with the terms of the special retirement offer and accept this offer voluntarily with full knowledge of its significance, including the fact that by accepting it I waive any claim in any way connected with my separation from employment with General Motors. I acknowledge that no prior representations, promises or agreements relating to my employment and retirement have been made by General Motors

> which are contrary to this Agreement and that the special retirement offer and my acceptance of the special retirement offer constitute the entire and only agreement between me and General Motors. I understand that I shall not be eligible for recall to work and shall have no further right to employment with General Motors Corporation or any of its subsidiaries. Implementation of this special retirement is subject to the necessary approvals.

(Pl. Ex. 3 at 10-1.) The long-form also includes a paragraph in which the retiree agrees, "[i]n consideration of the terms of the special retirement offer," to release GM from any claims associated with cessation of employment, including age discrimination and civil rights claims. The form includes space for retiree and witness signatures, and date.

Richard O'Brien, GM Vice President of Corporate Personnel, stated that the "primary purpose" of the statement of acceptance was "to assure that . . . the employee did not make a decision that was coerced on him: . . . that there was a mutual agreeable separation by the employee, mutually agreeable between the corporation and the employee." (Tr. VIII(B) at 38.) "[W]hen the employee mutually agrees to that, giving up the job, the employee is accepting the early retirement program and the other benefits in effect at that time." (*Id.* at 40.) Although retirement was more expensive than layoff, O'Brien acknowledged that GM received value in exchange for the employee's agreement to retire early. (*Id.* at 40.) Early retirement allowed the Corporation to reduce its expenses through a reduction in the "overall head count." The statements of acceptance also protected the Corporation from age discrimination claims in both its short and long forms. (*Id.*; *see also*, Tr. XII(A) at 16, Lewandowski.) O'Brien considered early retirement a "win-win" situation "for the corporation and the employee." (*Id.* at 41; *see also*, Tr. XI(A) at 67, Mowers.)

In *Seward v. B.O.C. Div. of General Motors Corp.*, 805 F.Supp. 623 (N.D. Ill. 1992), the contractual nature of GM's statement of acceptance was assumed, and GM successfully opposed an employee's attempt to rescind his acceptance. O'Brien agreed with this position, testifying that a statement of acceptance, once signed, could not be rescinded. (Tr. VIII(B) at 38.)[18]

In *Bair v. General Motors Corp.*, 895 F.2d 1094 (6th Cir. 1990), a GM employee, signed a (short-form) statement of acceptance of early retirement before the "necessary approvals" had been secured. The Corporation then declined to extend an offer because Bair "was too valuable." Bair sued, "claiming that signing the Acceptance form created a binding agreement." *Id.* at 1096. The court disagreed. Although the form contained many of the indices of a contract, "[m]erely signing the form did not create a contract, since GM reserved the right to deny any particular employee participation." *Id.* at 1098. By implication, if Bair had obtained the "necessary approvals," a binding contract would have been formed.

In its post-trial brief GM virtually concedes that the statement of acceptance has contractual significance, and confines its argument to the meaning of its terms. (*See* GM Post-Trial Brief at 37-38.) According to GM, "the sole purpose of the statement was to protect GM against allegations that it coerced employees into retiring—and not to manifest some special contractual arrangement at variance with existing benefit plans." (*Id.*)

I find that both the long-form and short-form statements of acceptance of early retirement evidence a binding bilateral contract between GM and its early retirees. The statements are framed in clear contract language of offer,

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[18] Some GM witnesses believed otherwise. For example, James Lewandowski, who was an Assistant Personnel Director in charge of salaried employees at the Oldsmobile Division in Lansing, Michigan, (Tr. XII(A) at 23), testified that "the individual had the opportunity to opt out of the retirement, up until the day they left," even though a statement of acceptance had been signed. (*Id.* at 35.)

acceptance and agreement. By signing them, the salaried retirees in subclasses (1) and (2) agreed to retire and accept the applicable benefits. In exchange, they gave up future employment (and re-employment) with GM, the opportunity to earn future salary, benefits and pension accruals, and waived some of their legal rights to state claims against GM.

B. *What evidence may be relied on to interpret the contracts?*

Having concluded that GM contracted with the plaintiff class, I must now determine the terms of those contracts. I first "look to basic contract law" for principles of construction. *In re White Farm Equipment Co.*, 788 F.2d 1186, 1191 (6th Cir. 1986). "The legislative history demonstrates that Congress intended federal courts to develop federal common law in fashioning" relief under ERISA. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 3097, 87 L.Ed.2d 96 (1985) (Brennan, J., concurring); *see also, Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 234-35 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986).

Although the statements of acceptance appear to be "a final expression of one or more terms of an agreement," they are not completely integrated contracts. Restatement (Second) of Contracts §§ 209(a), 210 (1981). "Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule." *Id.* at § 210 (3). The statements of acceptance clearly do not contain all of the contract's terms. Reference is made to the "Special Early Retirement provisions of the General Motors Retirement Program" and "the benefits applicable to me under the provisions of the Program." Other evi-

dence concerning the meaning of these phrases and contractual intent must be considered.

The early retirees rely on information provided to them at the time they considered early retirement to supply missing terms and interpret the meaning of "benefits applicable to me." GM argues that the statements of acceptance refer exclusively to the Retirement Program; and, in turn, that the plan documents for the Retirement Program refer exclusively to pension benefits with no mention of health care. Moreover, GM claims that the benefit summaries given to members of the plaintiff class as they considered retirement are of no legal consequence. Rather, the SPDs—"Your GM Benefits" and "Your Benefits in Retirement"—must control.

Generally, interpretation of an employee benefit plan must begin with the plan documentation ERISA requires employers to maintain—the official "written instrument" and/or the SPD. *See, e.g., Musto v. American General Corp.*, 861 F.2d 897, 900-01 (6th Cir. 1988); 29 U.S.C. §§ 1022, 1102(a)(1). In this case, however, members of the plaintiff class were offered a special deal, the terms of which go beyond the general retirement plan. *Musto* specifically reserved this question:

> Whether, under ERISA, employees can ever obtain vested rights in welfare plan benefits on the strength of written representations outside the official plan document is a question we need not decide. . . .

Id. at 907.

In support of its contention that the (non-SPD) summaries provided to plaintiff class members at the time of their retirements cannot control, GM relies, in part, on *Flacche v. Sun Life Assur. Co.*, 958 F.2d 730, 735 (6th Cir. 1992). In *Flacche*, the U.S. Court of Appeals for the Sixth Circuit reaffirmed and then limited an earlier opinion, *Edwards v. State Farm Mutual Auto Ins. Co.*, 851 F.2d 134 (6th Cir. 1988), concerning SPDs. In

Edwards, the court held that an SPD controls over conflicting provisions in a corresponding written plan.

> "It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet." *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985). *See also Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984) (reliance or prejudice from faulty plan summary is ground for relief); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir. 1984) (misleading summary plan description, combined with misleading management representations, preclude summary judgment in favor of employer); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 3 (1st Cir. 1978) (enforcing summary of retirement plan) *cert. denied*, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979); *Genter v. Acme Scale and Supply Co.*, 776 F.2d 1180, 1185 (3d Cir. 1985) (the summary plan description must not mislead, misinform or fail to inform participant and beneficiaries of the plan); *Hurd v. Hutnik*, 419 F.Supp. 630, 656-57 (D.N.J. 1976) (despite disclaimer, summary plan statement governs).

Edwards, 851 F.2d at 136. Edwards also received misleading annual reports and letters from his personnel manager.

> [T]he material misrepresentations [contained in the SPD] were aggravated by Hill's reassuring letters to Edwards verifying the summarized definition of "service time" as well as the assurances conveyed by the 1982-1983 reports of his credited service time in the "Annual Statements—U.S. Employee Retirement Plan" provided to him.

Id. at 136. And in a case cited by *Edwards*, the court looked to management representations and past practice, as well as the summary plan description, to determine whether or not health care benefits had vested. *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984).

The plaintiff in *Flacche* relied on a "Summary of Benefits Certificate" that was mailed to him after he retired. The court concluded that, unlike an SPD, the certificate could not trump ERISA-required plan documents. *Flacche* at 736. The facts of *Flacche*, however, are markedly different from those involved here. Shortly after Flacche's retirement, he was informed by letter that his pension would be $2,861 per month. When the payments arrived they were in the amount of $3,959 per month. Later that year he received a "Summary of Benefits Certificate," indicating that the figure would be increased to $4,846 per month. Two years later, the error was corrected, and Flacche's pension was reduced. In the meantime, in reliance on the higher figure, Flacche had retired from a second job. Flacche sued for breach of fiduciary duty and promissory estoppel.

The circumstances surrounding the certificate mailed to Flacche differ significantly from this case. The information given to plaintiff class members as they considered whether or not to give up their jobs was designed both to inform and to encourage acceptance of early retirement. For these reasons, GM supplied them with the information *before* they retired. Flacche did not receive his benefits summary until *after* he retired. Furthermore, GM's early retirees had every reason to believe they were being offered a special deal, apart from regular retirement. (*See, e.g.*, Tr. III(B) at 74, Sadler told "this is a new, special, one-time [deal] that superseded everything else"; Tr. IV(A) at 5, Knight told that if he remained at plant until closing he would be offered special early retirement.) Flacche apparently took an ordinary form of retirement involving no special incentives. Unlike plaintiff class, he did not have a contract claim.

GM also cites *Hicks v. Fleming Cos.*, 961 F.2d 537 (5th Cir.1992). Hicks claimed entitlement to disability benefits, even though, as he conceded, under the terms of the plan he was not eligible for them. He relied on a single document, which he received shortly before his accident, "Your 1988 Total Compensation Report," indicating that he was eligible for disability benefits. It "also contained several disclaimers, warning that the information contained in the booklet was merely a summary, that benefit amounts were not final, and that its terms were subject to those in the various benefit plans themselves." *Id.* at 539. As with *Flacche*, the key difference between Hicks and members of the plaintiff class is the lack of offer and acceptance. Hicks was merely supplied with some misinformation. He did not agree to accept that information in exchange for a loss of employment rights and he did not rely on it, as GM's early retirees did rely on the information given to them.

GM contends, and I agree, that the SPDs cannot be ignored simply because they are regular plan documents. To do so would beg the question. If plaintiff class relied on, or reasonably should have relied on, the SPDs for the terms of their early retirement agreements, then the SPDs have significance. I find, however, that this did not occur in this case.

Several plaintiff class members testified that they did not consider "Your GM Benefits," because they did not believe it applied to them. (*See* Tr. II(B) at 71, Carl Gabrielson; Tr. IV(B) at 27, Ronald Lund; Tr. IV(B) at 53, Ellis Cook; Tr. VII(A) at 27, James Bruce.) The booklet was designed for distribution to active employees, presumably when hired and again when new versions were issued. Its distribution was not associated with any early retirement offer. As for "Your Benefits in Retirement," many early retirees did not receive it until after they retired, or just before they walked out the door. (*See* Tr. IV(A) at 20, Henry Knight; Tr. IV(A) at 68-

69, Wayne Riedel; Tr. IV(B) at 49-57, Ellis Cook; Tr. VII(A) at 72, Leonard Moeller.)[19] And those members of the class who retired before November 1977, when the booklet was first published, obviously could not have received it before then. For these reasons, I find that members of the plaintiff class reasonably could and did conclude that the terms of their special early retirements were not controlled by either "Your GM Benefits" or "Your Benefits in Retirement."

Furthermore, the disclaimers contained in these two publications were not in all cases clear. Many contain a "terms and conditions" disclaimer:

> Any reference to the payment of benefits is conditioned upon your eligibility to receive them. Each of these programs has its own terms and conditions which in all respects control the benefits provided.

(*See* Def.Ex. 501, "Your GM Benefits" (1966); Def.Ex. 504, "Highlights of Your GM Benefits" (1974); Pl.Exs. 27 and 29, "Your GM Benefits" (1977 and 1980); Pl. Exs. 28 and 30, "Your Benefits in Retirement" (1977 and 1980), both also state that "health care coverages . . . are subject to change in the future.") More explicit disclaimers did not appear until 1985: "General Motors reserves the right to amend, change or terminate the Plans and Programs described in this booklet." (*See* Pl.Exs. 31 and 32.)

In a case involving a similar "term and conditions" disclaimer, the court concluded that "[t]o give effect to such a disclaimer would wholly undermine the rule that the statements of the summary plan description are binding." *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991). I agree that a "terms and condi-

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[19] Others may have received it earlier in the process. (*See* Tr. II(A), Edmond Burnside; Tr. IV(B) at 13, Ronald Lund; Tr. V(A) at 88 and V(B) at 16, Linda Denner.)

tions" disclaimer (also found in some of the benefit summaries on which plaintiffs rely) should have no force in the context of special early retirement offers.

The disclaimer that appears in the 1977 and 1980 versions of "Your Benefits in Retirement"—"GM health care coverages have been changed from time to time through the years and are subject to change in the future"—also lacks force. Members of the plaintiff class understood this to mean that positive, not negative, changes were possible. (*See, e.g.*, Tr. II(B) at 4-6, Edmond Burnside; Tr. VII(A) at 52-53, Leonard Moeller.) GM argues that changes to the health care program (both improvements and reductions in coverages) were a regular occurrence over the years. The evidence, however, demonstrates that changes were always communicated to employees as positive improvements. (*See, e.g.*, Pl.Ex. 46 (1973), "new and improved compensation, policies and benefit programs"; Pl.Ex. 48 (1976), "major improvements in benefit plans"; Pl.Ex. 49 (1976), "Improvements in GM Salaried Employee Compensation, Policy and Benefits"; Pl.Ex. 51 (1979), "1979 Benefits Improvements for General Motors Salaried Retirees and Eligible Survivors"; Pl.Ex. 57 (1982), "detailing changes and improvements in policies and benefit plans for U.S. salaried employees"; Pl.Ex. 58 (1985), "Benefits Improvements for General Motors Salaried Retirees and Eligible Survivors".)[20]

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[20] GM also relies on a disclaimer found in a form used to process retirement pensions—the SRP-117. This form was in use from at least 1974 until it was replaced by a computerized version in 1983. The form is entitled, "General Motors Retirement Program for Salaried Employes[:] Authorization of Monthly Part A Benefits and Part B Supplementary Benefits." (*See, e.g.*, Def.Ex. 770(F).) The form was used to "set up" employees in the pension check payment system, and all retirees were required to sign it. (Tr. XIII(A) at 43, Warren Sherman.) The front of the form includes detailed information on the retiree and his or her pension benefits. Among

C. Douglas Eavenson, former Director of Health Care for the Corporation, believed that these disclaimers must be interpreted in the light of a history of positive program changes. In response to a question concerning possible conflict between his position that GM breached its promise to provide retirees with lifetime health care and the disclaimers found in "Your Benefits in Retirement," Eavenson stated:

> I think that apparent conflict can be resolved if you look at and think about the culture that existed within General Motors over those years during which employees were told repeatedly that these coverages would be continued for life, and so when there's an admonition that there may be modifications or changes, I think that—that reading has to do with the past experience that we've had of making some changes. Those changes were always improvements. There was not an admonition that—that this program can be drastically reduced or eliminated.

(Tr. I(A) at 60.) This history of emphasizing the positive is also reflected in a comment made by a member of GM legal staff at a meeting attended by Eavenson and various divisional personnel directors:

> GM is not in sound position to win the probable lawsuit filed by retirees. Program booklets and pre-

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other comments in small print on the reverse side, the following appears:

> Subject to the provisions of the General Motors Salaried Insurance Program and the Comprehensive Medical Expense Insurance Plan for Retirees and Surviving Spouse, I may be eligible to continue . . . Basic Medical Coverage for Self and Eligible Dependents. . . .

The computerized version of the form is one-sided, without any of the information included on the reverse side of the original form. Given the full context of information supplied to plaintiff class members concerning their health care, this statement on the back of a single form designed to trigger payment of pension benefit is without significance.

> vious pre-retirement interviews have not stressed the possibility of "negative" program changes.

(Pl.Ex. 303 at 2.) Eavenson recalled that there was "particular concern with respect to individuals already retired, that they had—had retired with the understanding that their coverages would continue as they were without reduction and without them making payments for cause." (Tr. I(B) at 7.)

GM also argues that any oral statements made to plaintiff class members cannot be relied upon to modify an ERISA plan. ERISA requires that every employee benefit plan be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Courts have stressed the importance, for both employer and employee, of the predictability provided by written plans. Citing *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993), the court in *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir. 1993), went so far as to say: "It is well-established that the written terms of a plan may not be modified or superseded by oral assurances or other extrinsic evidence." However, *Boyer* at 1005 also noted:

> The written terms of the plan documents control and cannot be modified or superseded by the employer's oral undertakings. [*Musto*] at 910. However, if the plan documents are ambiguous with respect to a particular term, then, under federal common law, a court may use traditional methods of contract interpretation to resolve the ambiguity, including drawing inferences and presumptions and introducing extrinsic evidence. *See White Farm*, 788 F.2d at 1193.

See also Smith v. ABS Industries, Inc., 890 F.2d 841 (6th Cir. 1989) (court relied in part on oral statements to find health care benefits vested at retirement). Thus, if the terms of a particular plan are unclear, extrinsic evidence (including oral statements) may be considered.

In *Gordon, supra,* several terminated employees claimed a vested interest in a severance plan that was replaced by a less generous plan before they were terminated. The court rejected their claim, because no evidence demonstrated that the employer had agreed to contract away (or vest) severance benefits. *Id.* at 136. The opinion distinguished *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991), a case involving reliance on oral statements:

> In *Armistead,* the company had a welfare plan that gave it the right to modify its provisions. The company plant closed down, and employees were given the opportunity to transfer. Numerous employees chose to retire because they were told by the company that the Plan provided favorable retirement benefits. Upon retirement, the company informed the employees that the Plan had been altered and the employees would not receive benefits. At that point, it was too late for the employees to obtain a transfer.

Gordon at 137. *Armistead* concluded that an estoppel claim *based on oral assurances* could be maintained. In rejecting the argument that oral statements may not be relied upon, the court stated:

> This reasoning applies primarily to cases involving pension plans and is much less cogent when welfare benefit plans are at issue. The reason is that pension benefits are typically paid out of funds to which both employers and employee contribute. Contributions and pay-outs are determined by actuarial assumptions reflected in the terms of the plan. If the effective terms of the plan may be altered by transactions between officers of the plan and individual plan participants or discrete groups of them, the rights and legitimate expectations of third parties to retirement income may be prejudiced.
>
> This is not necessarily the case with insurance benefit plans. Typically the employer pays policy pre-

> miums out of his own assets, perhaps with a contribution from the employee. The actuarial soundness of a fund, which might be depleted if strict vesting and accrual requirements were not observed, is not an issue where the plan of this description is involved. We conclude therefore that in such a case, the purpose of Congress in enacting 29 U.S.C. § 1102(a) would not be frustrated by recourse to estoppel principles, which are generally applicable to all legal actions.

Armistead at 1300.

Although plaintiffs' estoppel claim is not currently before me, I observe that the facts of plaintiffs' case are more similar to *Armistead* than to *Gordon*. In *Gordon*, no voluntary event, such as early retirement, occurred to seal an alleged promise. Although the U.S. Court of Appeals for the Sixth Circuit has declined to adopt a *per se* rule to the effect that welfare benefits vest at retirement, it has held that benefits may vest at retirement if the parties so intend. *White Farm*, 788 F.2d at 1192-93; *Armistead* at 1297-98. Detrimental reliance was also a distinguishing factor in *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir. 1990) ("Plaintiffs have failed to show any detrimental reliance based on the defendant's failure to comply with section 1102(b), and, under these circumstances, we decline to impose the substantive remedy of prohibiting plan amendment in response to defendant's procedural violations").

Plaintiffs suggest that the *Edwards* principle (SPDs control over written plan) be extended and applied by analogy to this case. "[I]n the context of the early retirement agreements, it is the benefit explanations which are the primary source of information received by employees regarding their retiree health care benefits," not benefit booklets "generated outside the context of the early retirement agreements." (Plaintiffs' Post-Trial Reply Brief at 15-16.) ERISA "contemplates that the summary will be an em-

ployee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2d Cir. 1990). Likewise, the benefit explanations provided early retirees at the time of their retirement were the primary source of information they received regarding employee benefits, and they were entitled to rely on them.

In summary, I find that in the context of special early retirement offers, class members could, and did, justifiably rely on information supplied to them, in both written and oral form, at the time of their retirements.

C. *Did the contracts include health care?*

Some evidence supports GM's claim that it did not *subjectively* intend to offer early retirees a special health care program. For example, James Lewandowski, who drafted the initial statements of acceptance, testified that they were designed to refer exclusively to the "Retirement Program," and "the only benefits applicable to individuals under the provisions of the Salaried Retirement Program are those income replacement or pension amounts that an individual would receive on a monthly basis." (Tr. XII (A) at 21.) However, subjective intent is not the proper test in a contract case.

Contractual intent is concernd with objective manifestations of intent, not with the subjective, hypothetical, unexpressed, or nonexistent intentions of the parties. "[T]he relevant intention of a party is that manifested by him rather than any different undisclosed intention. In cases of misunderstanding, there may be a contract in accordance with the meaning of one party if the other knows or has reason to know of the misunderstanding and the first party does not." Restatement (Second) of Contracts § 212, comment a (1981); *see also, id.* §§ 201 and 2; *In re Lane*, 742 F.2d 1311, 1316, 1316 (11th Cir. 1984)

("It is well-recognized in all areas of the law, that a *subjective* intent on the part of an actor will not alter the relationship or duties created by an otherwise objectively indicated intent"); *Lowrance v. Hacker,* 888 F.2d 49, 51 (7th Cir. 1989) ("overriding goal of contract interpretation is to give effect to the reasonable expectations of the parties"); *Empro Mfg. Co. v. Ball-Co Mfg., Inc.* 870 F.2d 423, 425 (7th Cir. 1989) ("Contract law gives effect to the parties' wishes, but they must express these openly"); *Brobeck, Phleger & Harrison v. Telex Corp.,* 602 F.2d 866, 873 (9th Cir.), *cert. denied,* 444 U.S. 981, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979) ("Under the modern theory of contracts we look to objective, not subjective, criteria in ascertaining the intent of the parties").

In order to discern the objective intent of the parties in a benefit plan situation, a trier of fact may consider (1) the (subjective) intent of the employer, (2) the reasonable understanding of the beneficiaries, and (3) the past practice of the parties, among other evidence probative of the parties' contractual intent. *Alexander v. Primerica Holdings, Inc.,* 967 F.2d 90, 96 (3rd Cir. 1992). *See also* Restatement (Second) of Contracts § 212(1) (1981) ("The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances . . . .")

In this analysis, emphasis should be placed on the reasonable understanding of the beneficaries. ERISA was designed to protect their interests. *See* 29 U.S.C. § 1001 (a). Furthermore, the rule of *contra proferentem,* which was essentially adopted by the U.S. Court of Appeals for the Sixth Circuit in *Edwards, supra,* requires that benefit plan ambiguities be construed in the employees' favor. *Germany v. Operating Engineers Trust Fund,* 789 F. Supp. 1165, 1169 (D.D.C. 1992); *Kunin v. Benefit Trust Life Ins. Co.,* 910 F.2d 534, 539 (9th Cir.), *cert. denied,* 498 U.S. 1013, 111 S.Ct. 581, 112 L.Ed.2d 587 (1990); *Masella v. Blue Cross & Blue Shield, Inc.,* 936 F.2d 98,

107 (2d Cir. 1991); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991); *Phillips v. Lincoln Nat. Life Ins. Co.*, 978 F.2d 302, 311-14 (7th Cir. 1992). *Hansen* explains:

> In contracts of insurance generally, ambiguities are resolved against the drafter. *See, e.g., City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 15 (5th Cir. 1991). The same rule should apply here; the ambiguity in the summary plan description must be resolved in favor of the employee and made binding against the drafter. Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document.

Hansen, 940 F.2d at 982.

The reasoning behind the doctrine of *contra proferentem* is similar to the reasoning behind the ERISA provision requiring summary plan descriptions to "be written in a manner calculated to be understood by the average plan participant, and [ ] sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1); *see also*, 29 C.F.R. § 2520.102-2(a). U.S. Department of Labor regulations require that summary plan descriptions contain a clear statement of circumstances which could result in loss of or ineligibility for "benefits that a participant or beneficiary might otherwise *reasonably expect* the plan to provide on the basis of the description of benefits required by . . . this section." 20 C.F.R. § 2520.102-3(1) (emphasis added); *see also*, 29 U.S.C. § 1022(b) (plan and SPD must indicate "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits").

I reject GM's argument that the phrase "benefits applicable to me" in the statements of acceptance must be interpreted to refer exclusively to pension benefits. Much of the benefits information provided to employees as they considered early retirement was not limited to pension benefits. On the contrary, these documents almost uniformly included descriptions of GM's Savings-Stock Purchase Program, the Employee Stock Ownership Plan, life insurance, accidental death benefits and, importantly, health insurance. The Morris Memorandum, Pl.Ex. 420, discussed in section VI(A), above), is a good example. Morris stressed the importance of providing potential early retirees with "the information the employee and his family may need to make a well informed decision regarding early retirement." In an attached list of "important considerations," Morris mentions lifetime health care benefits at no cost. Many of the sample group retirees received the attachment, an indication of its wide distribution. Furthermore, other evidence demonstrates a company policy of providing information on health care to employees during retirement interviews. (*See, e.g.*, Pl.Ex. 409, discussed above in Section V(B).)

Since GM emphatically denies that it ever promised lifetime benefits without cost to its early retirees to induce them to retire, the Morris Memorandum is troubling because it seems, then, to be deceptive. Morris explicitly advised the personnel directors at all GM facilities to stress the importance of full health care coverage in retirement without cost to all employees considering early retirement, but he failed to mention the possibility that health care benefits could be reduced or even eliminated after the employee retired. Other evidence also overwhelming demonstrates that this negative possibility was rarely mentioned to potential retirees, while the advantages of lifetime health care benefits at no cost was actively stressed.

GM used imprecise language when referring to its retirement and health care programs, and must bear the burden

of this mistake. As detailed in Section VI above, health care was often listed as a retirement benefit on documents received by potential early retirees. Even "Your GM Benefits" discusses post-retirement health care in a section devoted to retirement benefits, rather than in the health care section.

Thus, I find that early retirees could and did conclude that health care was part of the early retirement program they agreed to accept; and that GM had reason to believe employees would make such a conclusion. Early retirees received both documents and oral communications that uniformly stressed the value of *all* retirement benefits, including health care.

D. *What health care benefits were promised?*

Now that I have found that members of the plaintiff class reasonably concluded that health care benefits were included in the early retirement offers, I must determine the extent of those benefits. Before undertaking this analysis, I will summarize the evidence on which I find plaintiff class reasonably relied for information on health care benefits in retirement.

CENTRAL OFFICE

Pl. Ex.	*Information Received*	*Retiree*
4-11	Morris Memorandum. Told he would have health care for his lifetime at no cost.	Carl Gabrielson
4-11 4-61	Morris Memorandum. Eligible for basic health care for life.	Margaret Greenan
4-11	Morris Memorandum.	Brainard Kugler John Lockwood
4-16 4-17	"GM pays the premium for you and your covered dependents for your lifetime." "BC/BS will be continued at GM expense."	Joseph Fox

Pl. Ex.	*Information Received*	*Retiree*
4-8	"Your basic coverages will be provided a Corporation expense for your lifetime."	Robert Bickmyer
4-47	"Upon retirement, all health care coverages will be continued."	
4-48	Blue Cross/Blue Shield paid by GM, "for lifetime" at "no cost to retiree."	
4-10	Blue Cross/Blue Shield wil be "continued without cost to you."	
4-8	[See above.]	Frank Laurenzo
4-10	[See above.]	
4-30	"GM pays full cost for lifetime" for Blue Cross/Blue Shield upon retirement.	
4-7	[See above.]	Rocco Ruggiero
4-8	[See above.]	
4-10	[See above.]	
4-7	"GM pays full cost for Lifetime" for medical insurance.	Dario Breata Helmut Heisinger
4-8	[See above.]	
4-7	[See above.]	William Cooney
4-8	[See above.]	
4-9	GM pays for Blue Cross/Blue Shield during retirement.	

GENERAL MOTORS ASSEMBLY DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-1	Basic health insurance paid by GM for "lifetime" of retiree.	Clinton Burns
4-2	"Your basic health insurance is paid up for you and your spouse for the rest of both of your lives."	
4-1	[See above.]	Donald Nesbit
	Walter Huppenbauer consistently told retirees "basic health insurance for the rest of their life free . . ."	South Gate retirees from 1974 to 1981

Pl. Ex.	*Information Received*	*Retiree*
4-42	"Health care coverages are continued for you and your eligible dependents for your lifetime, with General Motors paying the full cost. . . ."	Armand Petrolina
4-3	"Blue Cross or Kaiser—Employee covered at no cost to employee."	Anthory Boldizar Bresse Dame Kenneth Engle Michael Fernicola Anne Glick Earl Gordon Junior Rehor Leroy Tunistra Donald Allan Henry Calderon Patrick Callahan
	Told by Anne Glick that "whatever was on the sheet [Pl.Ex. 4-3] is what they are entitled to in their retirement for the rest of their lives at no expense to them."	Retirees at Van Nuys Assembly in 1979.
	M. Scott Pruyn told retirees they would continue to have same health care program they had as employees as long as they lived, at no cost to them. "I was told that was General Motors' policy from practically every personnel director that I worked for. . . ."	Retirees at Van Nuys Assembly from 1974 to 1977.
4-11	Morris Memorandum.	Elsie Winters
4-34	Basic health insurance "continue for self + dependent for life."	Lionel Brace

CHEVROLET DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-11	Morris Memorandum.	Carl Gabrielson Walter Hultquist Ken Richardson

Pl. Ex.	*Information Received*	*Retiree*
	Wayne Riedel, a personnel supervisor, told early retirees that "hospital and medical insurance would be paid by the corporation in full, and if they should die first, the full benefit would pass on to their surviving spouse."	Employees at Chevrolet-Toledo

CHEVROLET-PONTIAC-CANADA GROUP

Pl. Ex.	*Information Received*	*Retiree*
4-51	"All health care coverage will be continued" upon retirement.	Ronald Conrow
4-52	"All health care coverage will be continued" upon retirement.	Carl Brown
4-49	"Upon retirement . . . all health care coverage wil be continued, at corporation expense."	
4-49	[See above.]	James Baker
4-39	"Upon retirement, all health care coverages will be continued at Corporation expense."	Sam Emerick
4-40	"Upon retirement, all health care coverages will be continued."	
4-40	[See above.]	Richard Hayes Donald Pavelsak
4-50	"Benefits continued for life at no cost to employe."	Roy Karp Edward Miketo Roy Abbott

DELCO AND AC SPARK PLUG

Pl. Ex.	*Information Received*	*Retiree*
4-5	Provided with BC/BS and Prescription Drug Program coverages without cost for lifetime.	Francis Doonan
4-6	"Upon retirement free Blue Cross —Blue Shield for you and your spouse for your lifetimes."	

Pl. Ex.	*Information Received*	*Retiree*
4-4	"Upon retirement all health care coverages will be continued at corporation expense."	Wilbur Oakley
4-11	Morris Memorandum.	Pauline Holt Harold Bourcier John Homola O. David Nelson
4-11	Morris Memorandum.	Edmond Burnside G. Dombrowski John Sheppke
4-12	After retirement coverages will be continued at no cost to retiree.	
4-13	"Coverage after retirement will be continued at no cost to employe."	
	Schwerzel stressed to Burnside advantages of free health care benefits in retirement. "This was the big benefit that he [Schwerzel] preached and preached and preached down here, and I was very insistent on it."	
4-12	[See above.]	Billie Gates
4-13	[See above.]	George Hamilton
	O. David Nelson, Plant Manager, told early retirees that the benefits "they then had would continue and that there would be basically no increase in the cost to them for their lifetime. . . ."	Employees at Delco plant in Olathe, KA
4-35	"GM pays for the full cost of coverage for the retiree . . . and for his eligible dependents. . . ."	Charles Meyers Robert Forst

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DETROIT DIESEL ALLISON DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-11	Morris Memorandum.	James Bruce Paul Onufer
4-18	"Your company-paid medical insurance coverages remain the same after retirement that you have as an active employee."	Raymond Lucid

Pl. Ex.	*Information Received*	*Retiree*
4-28	Hospital/medical, prescription drug, dental, vision and hearing aid coverages provided in retirement "at no cost to retiree."	Ernest Rasmussen Bartlett Cady
4-28	[See above.]	Ronald Lund
	Told by personnel representative that he "would have the complete program as it stood on that date for as long as we lived."	
4-28	[See above.]	Mary Franklin
4-59	You will retain health care coverage for life.	

FISHER BODY DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-19	"Blue Cross/Blue Shield and dental expense are paid for by corporation for life."	Robert MacKinnon Glenn Palmer John Perkins
	Told by supervisor that "I'd have the same coverage at no cost for me and my wife the rest of my life."	Glyn Sadler
4-31	"Your Blue Cross/Blue Shield and Dental Expense coverages will be continued without cost to you as the Corporation will pay the full cost of this protection subsequent to your retirement."	John Abrinko
4-11	Morris Memorandum.	Leonard Moeller
	Told by a personnel representative that he would have the same health care benefits for his lifetime as he had while an employee.	

GENERAL MOTORS INSTITUTE

Pl. Ex.	*Information Received*	*Retiree*
4-11	Morris Memorandum.	Virginia Spencer

Pl. Ex.	*Information Received*	*Retiree*
4-20	Health care coverages paid through retirement.	

HARRISON RADIATOR

Pl. Ex.	*Information Received*	*Retiree*
4-21	"The Corporation continues to pay full contribution for the retiree, spouse and eligible dependents. . . ."	Frank Disinger

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HYDRAMATIC/POWERTRAIN DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-22	Blue Cross wil be paid by GM.	Al Petcavage Clifford Thompson Clifford Wilford Lloyd Campbell
4-22	[See above.]	Bertram Bradley
4-32	BC/BS "paid by GM for Retiree and Eligible Dependents throughout retirement."	

PACKARD ELECTRIC

Pl. Ex.	*Information Received*	*Retiree*
4-24	"During retirement, you . . . will continue to have the same health care program you enjoy today. . . ." Only expense will be for CMEP.	John Gerald Joseph Tori Dale Ackerman William Capito Dorothy Carty

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PARTS DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-25	Health care "Fully paid by GM."	Robert Morris Howard Bolerjack
4-11	Morris Memorandum.	
4-11	Morris Memorandum.	William Kovarik

SAGINAW STEERING GEAR DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-26	Health care provided by GM or paid for life by GM.	Fred Rehfeld Fran Van Tiflin Marcene Zinz William Alarie John Alarie Thomas Austin Jack Coon Clyde Alexander Mildred Campbell Charles Carder Jack Coon Holston Caldwell Thomas Casey

CENTRAL FOUNDRY DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-27	"GM pays for the full cost of coverage for the retiree. . . ."	Trafton Abbott Thomas Cahape
4-27	[See above.]	Meredith Robinson
4-53	Highlights of plan: "Continued health care coverage during retirement."	
4-27	[See above.]	Thomas Wiegandt
4-64	GM will pay full cost for retiree.	

TEREX DIVISION

Pl. Ex.	*Information Received*	*Retiree*
115 (d)	"Health care coverages are continued for you and your eligible dependents for your lifetime with GM paying the full cost."	Walter Lampert
4-33	Health care continued for life at no cost to retiree.	
	Told by Director of Sales for North/South America: "Look at your health benefits, continued for life and worth a fortune."	

Pl. Ex.	*Information Received*	*Retiree*
4-29	[Same as 115(d) above.]	Ed Plivelich
4-50	Health care, prescription drug, vision care, dental "continued for life at no cost to employee."	
4-33	[See above.]	Norman Davis
4-11	Morris Memorandum.	
4-11	Morris Memorandum.	Raymond Vincent

BUICK MOTOR DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-14	"Your present coverage will be continued on a Corporation paid basis."	Mary Jane Tigner
4-15	[Same as 4-14 above.]	Corwin Ballentine Elizabeth Baly D. Heidenberger Ruth Koviak
4-14 4-15	[See above.] [See above.]	Wallace Howe
4-11 4-14	Morris Memorandum. [See above.]	G. Turmpaugh
4-11 4-15	Morris Memorandum. [See above.]	John Sullivan
4-58	"Coverage continued on Corporation paid basis."	Carlin Belville
4-58	[See above.]	Thomas Stephens
4-40	"Upon retirement, all health care coverages will be continued."	

OLDSMOBILE DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-11	Morris Memorandum.	Robert Brown

BUICK-OLDSMOBILE-CADILLAC GROUP

Pl. Ex.	*Information Received*	*Retiree*
4-43 4-44 4-46	"Upon retirement, all health care coverages will be continued at Corporation expense."	Jerome Nosal Edna Burns Thomas Loftin Charles Smith
4-45	All health care coverages will be continued.	Daniel Spencer
4-57	"Upon retirement all health care coverages will be continued at Corporation expense."	N.P. Wuest
4-40 *	"Upon retirement, all health care coverages will be continued."	Gary Johnson

* Franklin Anderson from the Lansing Product Team, Wilfred Best from the Inland Division, and Richard Berube from GM's Research Laboratories also received this document.

ELECTRONIC DATA SYSTEMS

Pl. Ex.	*Information Received*	*Retiree*
4-37	Health care coverage provided during retirement at GM expense.	Beatrice Kirley
111 (b) & (c) & (g)	Noncontributory health care coverage provided after retirement. Health care coverages will be continued. Health care provided at GM expense during retirement.	Steven Horvath
111 (e)	"You'll continue the same hospital/medical-surgical benefits in retirement you had as an active employe. . . . The cost, of course, is entirely paid for by the Corporation."	

ENGINEERING

Pl. Ex.	*Information Received*	*Retiree*
4-38	"BC/BS will be continued at GM expense."	Frank Caito Albert Abbo

Pl. Ex.	*Information Received*	*Retiree*
4-38	[See above.]	Joseph Renvez
4-41	"Upon retirement, all health care coverages will be continued."	
4-11	Morris Memorandum.	George Hurst

NEW DEPARTURE HYATT BEARINGS DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-54	"Full basic health care coverages for yourself and eligible dependents are continued for life at no cost to you."	Joseph Miller
4-60	"Upon retirement, all health care coverages will be continued."	E.M. Chacko

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TRUCK AND BUS GROUP

Pl. Ex.	*Information Received*	*Retiree*
4-63	"As a retiree, you will receive the same health care coverage that you now receive."	Beth DeFlurin Carl Cary
4-63	[See above.]	Orvil Summers
4-37	Health care coverages provided during retirement at GM expense.	
4-63	[See above.] When Knight asked if health care benefits could be taken away, he was told to consider his past experience.	Henry Knight
4-63	[See above.] Gussie Green told Cook and others that "we would receive our medical benefits the rest of our life at no cost to us."	Ellis Cook
156 (a), (c) &	Morris Memorandum (revised). Hospitalization coverage will be "continued after retirement at no cost to retiree."	Roger Hunt

Pl. Ex.	*Information Received*	*Retiree*
(d)	"Health care coverages provided at GM's expense for lifetime."	
4-55	Hospitalization coverage will be "continued after retirement at no cost to retiree."	Robert Benson John Ris Peter Capizzi
	Kenneth Titherage told retirees Pickett and White that they would receive the same type of health care and dental coverage in retirement as they had while working, at no cost to them.	Robert Pickett Helen White
4-55	[See above.]	Bobby Upchurch
4-62	"Upon retirement, all health care coverages will be continued."	
4-62	[See above.]	William Wessinger
	Kenneth Titherage advised potential retirees that "health care would continue in retirement, as we had been accustomed to it during working days, and at no cost to the employee."	Retirees in the Truck & Bus Engineering Dept. between 1974 and 1987.
170	[Same as 4-55 above.]	Kenneth Titherage

ROCHESTER PRODUCTS DIVISION

Pl. Ex.	*Information Received*	*Retiree*
4-11	Morris Memorandum.	Albert Henry

Both the written and oral representations made to early retirees were made by GM employees with actual, or apparent authority to bind GM. *See Richards v. General Motors Corp.*, 991 F.2d 1227, 1232 (6th Cir. 1993):

> [A]pparent authority may attach even when the agent's acts are unauthorized. The commentary to § 159 of the Restatement [(Second) of Agency (1983)], which defines apparent authority, states that "when a principal refers others to an agent . . .

> for information, such person becomes the spokesman for the principal to them, with apparent authority to make statements upon the subject matter as to which reference is made, and the principal is bound by such apparently authorized statements or promises." *Id.* at § 159 cmt. *f.* Defendants admitted that questions about benefits were appropriately directed to an employee's personnel office or supervisor.

Indeed, "GM does not argue that the benefit descriptions which simply summarized the plan were not authorized." (GM's Reply to Plaintiffs' Post-Trial Brief at 27.)

Although various formulations exist, virtually all of the benefit explanations provided to the early retirees by GM contain statements regarding both the duration of health care benefits ("for life," "during retirement," "continued after retirement," "lifetime," "will be continued," "for the rest of your lives"); and the cost of the benefits ("no cost to retiree," "paid up," "at corporation expense," "without cost," "free," "GM pays full cost," "corporation paid basis," "at GM's expense," "paid for life by General Motors," "fully paid by GM").

Plaintiffs argue that phrases such as "Full basic health care coverages for the retiree and eligible dependents are continued for life at no cost to the retiree," (*see, e.g.*, Pl.Ex. 420, Morris Memorandum), have one clear meaning: the coverages the retiree came to expect as an employee will be continued for life at no additional cost to the retiree. GM argues that "no cost" means no premiums; and that, at the very least, GM was free to impose increased co-payments and deductibles on retirees.[21]

The court in *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017, 106 S.Ct. 1202, 89 L.Ed.2d 315 (1986), con-

[21] GM also argues that, due to its reserved right to amend the plan, it is also free to impose cost-sharing of the premium, and even to eliminate health care entirely.

cluded that "during the life of the pensioner" "clearly means that a pensioner will receive health benefits for the remainder of his life. . . ." GM repeatedly used the lifetime language. It appears in many of the benefit summaries relied on by plaintiff class, in addition to the SPDs. In addition, GM supervisors and personnel representatives often assured potential retirees that health care would be provided for their lifetimes.

Interpretation of "no cost" is slightly more complex. Every GM executive who testified, whether called by GM or plaintiffs, claimed that "no cost" means no premium cost. However, at least one executive acknowledged that the phrase is ambiguous. (Tr. V(B) at 63, Ryan.) GM also argues that employees could not reasonably assume that "no cost" means no out-of-pocket expenses (such as those associated with co-payments and deuctibles), because the health plan included co-payments and/or deductibles for many years before the changes made in 1988. Plaintiffs respond that the "line item" co-payments required before the 1988 changes were insignificant in cost associated with the 1988 changes.

GM consistently used formulations such as "at GM expense" and "at no cost to the retiree," without any qualification that "no cost" was confined to the payment of premiums. Employees were never told that "full cost" meant only premiums or subscription charges, and never told how these charges were computed. (Tr. XIII(A) at 10-11, 33, Sherman.) The restriction to the meaning of "no cost" asserted by GM loses even more force once GM became self-insured.[22]

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[22] Despite GM's contention that "no cost" means no premium cost, it has reneged on even that limited commitment. In changes implemented after the filing of this lawsuit, GM requires monthly contributions from early retirees for health care coverage on top of deductibles and co-payments. (Pl. Exs. 65, 66; Tr. IX(A) at 60-61, O'Brien.)

GM executives acknowledged that the co-payments and deductibles imposed in 1988 were major changes. For example, in response to an earlier statement made by O'Brien that no co-payments or deductibles were imposed for "basic" health care from 1964 through 1987, he explained:

> When I was speaking of that particular item, I was commenting in my mind on the—on the broad co-pays and deductibles that we introduced in—in 1988. We did not have those prior to 1988.

(Tr. VIII(B) at 53; *see also* Tr. I(A) at 53-54. Eavenson; Tr. VI(A) at 25-26, Snyder; Tr. XII(B) at 45-46, Sherman.) O'Brien also acknowledged that the 1988 changes were viewed as "major" by top corporate executives. (*Id.* at 61-62.) And GM administrative documents confirmed that the imposition of co-payments and deductibles was a major departure from past practice. (*See, e.g.*, Pl.Ex. 273 at bates stamp 1124, "introduction of co-pays and deductibles on traditional coverage"; Pl.Ex. 296 at Exhibit I, p. 7, "structure of the Traditional health care option will change to include deductibles and copayments"; Pl.Ex. 300, referring to "imposition" of deductibles and co-payments as a "major change.")

Historically, GM imposed small co-payments on vision and prescription drug coverage, small co-payments on outpatient psychiatric treatment after five visits, and a range of co-payments on various dental services. Hospital, surgical and medical coverages (excluding psychiatric care), however, operated on a "first dollar coverage" principle. (*See, e.g.*, Pl.Ex. 277 at 4, Pre-1988 coverage "provides first dollar fee-for-service coverage for basic hospital, surgical, and medical care and is supplemented by CMEP.") "First dollar coverage" indicates that coverage begins as soon as the first dollar is expended. The beneficiary is not required to meet a deductible or make a co-payment. (*See* Tr. VIII(B) at 59, O'Brien.) The 1988 changes

eliminated first dollar coverage for the traditional option. (*Id.* at 61.)

The substantive difference between the line item co-payments retirees were accustomed to paying, and program-wide deductibles and co-payments imposed in 1988, is further illustrated by the fact that the original line item co-payments continued to be charged separately even after the major changes in deductibles and co-payments were imposed in 1988. (*See* Pl.Exs. 33 at 17, 34 at 21-22, 251 at 6.) The line item co-payments on particular services simply did not sanction the across-the-board deductibles and co-payments imposed beginning in 1988.

Furthermore, early retirees reognized that "no cost" did not mean the elimination of already in place line item co-payments. They understood the promise to consist of a commitment not to reduce coverages or impose additional costs. For example, Walter Lampert, a Terex Division early retiree, understood the promise to be that "coverage then in existence would continue for the lifetime of myself and my spouse." (Tr. VI(A) at 41, 62.) When Ronald Lund, a Detroit Diesel Allison retiree, askd a personnel representative about the meaning of "no cost," he was advised that it meant no additional cost for the rest of his life. (Tr. IV(B) at 18.) And O. David Nelson, a plant manager in Olathe, Kansas, told early retirees "that the benefits that they then had would continue and that there would be basically no increase in the cost to them for their lifetime. . . ." (Tr. III(B) at 18.) (*See also* Tr. II(A) at 36, Huppenbauer; Tr. II(B) at 33, 37, 47, Titherage; Tr. II(B) at 70, Gabrielson; Tr. III(A) at 57, Pruyn; Tr. IV(B) at 39, Cook; Tr. V(A) at 72, Horvath; Tr. VII(A) at 41, Moeller.) Furthermore, some of the benefit summaries include language more directly in line with this interpretation. (*See, e.g.*, Pl.Exs. 104(b) and 113(a), "As a retiree, you will receive the same health care coverage that you now receive.")

I repeat my conclusion: The documentary and testimonial evidence demonstrates that the health care benefits existing at the time of early retirement would continue for the life of the early retiree and surviving spouse; and that the cost of such benefits would not be shifted to the early retiree. This includes hospital, surgical and medical coverages, in addition to prescription drugs, vision, dental and hearing aid coverage where applicable. CMEP must also be continued. The early retiree will be obligated to pay the cost of CMEP commensurate to the cost of this benefit at the time of retirement.

VIII. CONCLUSION

The 1988 health care benefit modifications implemented by GM—principally the imposition of program-wide deductibles and co-payments of up to $750 per year under the traditional option—breach the contract to provide health care benefits for life at no cost to the early retiree.

Alternatively, the early retirement agreements modified the general health care plan in favor of early retirees to prevent GM from exercising its right to make adverse plan changes; and the changes challenged by plaintiff class violate the terms of the plan as modified by the early retirement agreements.

An order of judgment may be presented.

APPENDIX F

[Filed Apr. 9, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 90-CV-70010
Hon. John Feikens

ROBERT D. SPRAGUE, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendant.

ORDER

Before me is defendant's motion for reconsideration of my order on class certification. My November 4, 1991, order certifying the class is amended to make explicit the class is certified under Federal Rule of Civil Procedure 23(b)(2). IT IS SO ORDERED.

/s/ John Feikens
JOHN FEIKENS
United States District Judge

DATED: April 9, 1992

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISON

Case No. 90 CV 70010
Hon. John Feikens

ROBERT D. SPRAGUE, *et al.*,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

ORDER ON CLASS CERTIFICATION

The court has before it plaintiffs' renewed motion for class certification and defendant's opposition thereto. Upon consideration of those materials, the parties' prior submissions on class certification, the "100 files" produced by General Motors, the 251 declarations submitted by plaintiffs, and the arguments of counsel, it is ORDERED pursuant to Fed. R. Civ. P. 23:

1. This action may be maintained as a class action. The court certifies as a class all salaried retirees of General Motors who took early retirement, or agreed to take early retirement, prior to March 1, 1988, or their surviving spouses.

2. The court further certifies the following subclasses:

a. Those early retirees who signed a long form statement of acceptance of retirement;

b. Those early retirees who signed a short form statement of acceptance of retirement;

c. Those early retirees who signed a statement of intent to retire; and

d. Those early retirees who signed neither a statement of acceptance of retirement nor a statement of intent to retire.

Persons who signed both a long form and short form statement of acceptance shall be in subclass a., above. Persons who signed both a statement of intent to retire and statement of acceptance shall be in subclass a. or b. above, as appropriate.

3. The court finds:

a. The class is so numerous—approximately 40,000 early retirees—that joinder of all members is impracticable;

b. There are questions of law and fact common to the class;

c. The claims of those among the 113 named plaintiffs who are early retirees are typical of the claims of the class; and

d. The representative plaintiffs will fairly and adequately represent the interests of the class.

4. The court further finds:

a. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy;

b. GM has acted on grounds generally applicable to the class, thereby making any final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole or with respect to subclasses as a whole; and

c. The prosecution of separate actions by the individual class members would create a risk of in-

consistent or varying adjudications with respect to individual members of the class, or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other nonparty members.

5. Upon application of a party, or upon the court's own motion, the court may modify this order or decertify the class or one or more subclasses, if appropriate.

6. The court will rule on the issue of notice to the class by separate order.

IT IS SO ORDERED.

Dated: Nov. 4, 1991

/s/ John Feikens
JOHN FEIKENS
United States District Judge

[Approval as to form obtained from R.F. Walker]

APPENDIX H

UNITED STATES DISTRICT COURT
E.D. MICHIGAN, S.D.

No. 90-CV-70010

ROBERT D. SPRAGUE, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendant.

July 29, 1991

OPINION AND ORDER

FEIKENS, District Judge.

This is a compelling case for interlocutory appeal. I certify it herewith, pursuant to 28 U.S.C. § 1292(b). A putative plaintiff class of more than 84,000 non-union ("salaried") retirees of the General Motors Corporation ("GM"), sues under the Employee Retirement Income Security Act of 1974 ("ERISA"). They seek a judgment which would require GM to furnish them with basic health care coverage at no cost to them for their lifetimes, and for the lifetimes of their surviving spouses. At issue is whether plaintiffs' health care benefits vested, *i.e.*, became immutable upon retirement, or whether GM is free to reduce those benefits.

In this opinion I find that benefits under GM's health care plan for salaried retirees (the "plan") did not vest

upon retirement. But I find that GM may have entered into bilateral contracts to provide such benefits to approximately 40,000 so-called "early retirees." Accordingly, I dismiss the claims of general retirees, but allow the claims of early retirees to proceed.

It does not appear to be wise or expedient to try this protracted case before there is a resolution of applicable law. Specifically, I find that there is substantial uncertainty in the case law whether ERISA preempts early retirees from claiming that GM bilaterally contracted with them to vest health care benefits that were otherwise not vested under general plan documents. If plaintiffs are allowed to proceed on this claim, it will be necessary to conduct extensive discovery to determine the terms and conditions of 40,000 alleged bilateral contracts. Before going down that path, it is prudent to determine whether the U.S. Court of Appeals for the Sixth Circuit will agree that the early retirees can state a cause of action. Accordingly, I certify the following questions of law:

1. Did the district court properly find, as a matter of law, that benefits under GM's health care plan for salaried retirees did not vest upon retirement?

2. If so, can early salaried retirees of GM state a cause of action under ERISA to enforce claimed vested health care benefits evidenced by bilateral contracts?

Although I do not believe that there is a substantial difference of opinion in the case law as to the first question, it must be reached before the second question can be resolved because the early retirees need not rely on bilateral contracts if the Sixth Circuit finds that they have vested benefits under general plan documents. I therefore certify both questions for interlocutory appeal.

I. *Procedural Background*

On August 8, 1989, plaintiff Robert D. Sprague, together with 113 other named plaintiffs, filed a complaint

in the United States District Court for the Central District of California against their former employer, GM, alleging that GM had violated their rights under ERISA, 29 U.S.C. §§ 1001 *et seq.* The named plaintiffs filed the complaint as a purported class action pursuant to Federal Rule of Civil Procedure 23, and claim to represent over 84,000 salaried retirees or their surviving spouses. On November 27, 1989, Judge William D. Keller ordered the action transferred to this court pursuant to 28 U.S.C. § 1404(a).

The essence of the complaint is that GM violated the terms of its health care plan, and thus ERISA §§ 402, 502(a)(1)(B) and 502(a)(3), 29 U.S.C. §§ 1102, 1132(a)(1)(B) and 1132(a)(3), when it reduced or eliminated certain health care coverages in 1988. (Complaint, Count II).

Plaintiffs also claim that the changes implemented in 1988 constitute a breach of GM's fiduciary duties arising under Section 404 of ERISA, 29 U.S.C. § 1104. (Complaint, Count III). Plaintiffs assert separate causes of action, arising from the same changes in health care coverages, based on breach of contract and equitable or promissory estoppel claims arising under "ERISA federal common law." (Complaint, Counts IV and V). Finally, plaintiffs allege that GM violated the requirements of ERISA by failing to maintain its health care plan pursuant to a written instrument, ERISA § 402(a), 29 U.S.C. § 1102(a); refusing or failing to supply requested information, ERISA § 502(c), 29 U.S.C. § 1132(c); and failing to comply with requirements for summary plan descriptions.

The matter is before me on cross-motions for partial summary judgment.[1] GM moves for summary judgment on Count II, arguing that the coverage modifications instituted in 1988 do not constitute violations of its plan

[1] This opinion also addresses, in part, GM's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

because retirees did not have vested benefits under the plan.

Plaintiffs move for summary judgment on Counts IV and V of the complaint in favor of early retirees based on bilateral contracts which allegedly contain GM's promise to provide early retirees with vested health care benefits.

For reasons set forth below, GM's motion for summary judgment is GRANTED as to general retirees but DENIED as to early retirees. Plaintiffs' motion is DENIED.

II. *Facts*

In 1964, GM began to pay the full cost, *i.e.*, the insurance premiums, for basic hospital, medical, and surgical insurance for salaried retirees. In 1968, this benefit was extended to most surviving spouses. GM also offered salaried retirees and surviving spouses an additional layer of coverage under its Comprehensive Medical Expense Insurance Program (CMEIP).[2] CMEIP participants were required to pay co-payments, deductibles, and a portion of the insurance premiums.

GM provided these coverages through arrangements it had with various private insurance companies throughout the country. Some of these arrangements were memorialized in written contracts of insurance between the carrier and GM; others were not. All insurance carriers provided participants with certificates of insurance detailing the terms of coverage.

When GM became self-insured in 1985, the use of insurance certificates was discontinued. Thereafter, GM drafted a document entitled "The General Motors Health Care Insuarnce Program for Salaried Employees." This document, together with subsequent writings which announced changes in coverage, describe GM's post-1985 health care coverage plan.

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[2] When GM became self-insured in 1985, CMEIP became CMEP.

The primary way GM has communicated its health care coverage plan to employees and retirees is through summary booklets. Prior to 1974 GM periodically published a booklet entitled "The GM Insurance Program For Salaried Employees." With the enactment of ERISA in 1974, the method of supplying participants with plan summaries was changed. Thereafter GM published a plan summary entitled "Highlights of Your GM Benefits." In addition, commencing in 1977, when summary plan description ("SPDs") were first required by ERISA, GM began to publish a booklet entitled "Your Benefits in Retirement," which served and continues to serve as the summary plan description for benefits provided to salaried employees.

Several of the summary booklets distributed to GM salaried employees and retirees contain statements informing participants that GM will pay the full cost of basic health care coverage during their retirement. For example, the 1968 booklet entitled "The General Motors Insurance Program for Salaried Employees" and its successor version issued in 1971 both contain provisions which state:

> If you retire . . . and are eligible to receive retirement benefits under the provisions of the GM Retirement Program for Salaried Employees, you may keep your basic hospital, surgical and medical expense coverages in effect. . . . GM will pay the full monthly premium or subscription charge for such coverage.

A 1974 booklet entitled "Highlights of Your GM Benefits" contains a heading entitled "After Retirement, Your Insurance Coverages Can Be Continued As Follows" and states:

> Hospital-Medical Coverages: Your basic coverages will be provided at Corporation expense for your lifetime (except for voluntary retirement between ages 55 and 60 when combined years of age and credited

service total less than 85). Dental coverages cannot be continued.

A 1977 booklet entitled "Your Benefits In Retirement" contains a section entitled "Your Health Care Benefits," and includes this question and answer:

> Are My Health Care Coverages Continued While I Am Retired?
>
> Your basic health care coverages will be provided at GM's expense for your lifetime. . . .

That same booklet also contains a section that reads:

> Who Pays for My Benefits?
>
> General Motors pays the full cost of any basic health care coverages that are continued for most retired employees and for eligible surviving spouses and children of deceased retirees.

Similar or identical statements are contained in numerous other booklets distributed by GM or its insurance carriers through the years.

However, these booklets also contain statements warning participants that their benefits are subject to change. Except for the booklet issued between 1974 and 1977,[3] each booklet contains a provision similar to one of the following:

> General Motors believes wholeheartedly in this Insurance Program for GM men and women, and expects to continue the Program indefinitely. However, GM reserves the right to modify, revoke, suspend, terminate, or change the Program, in whole or in part, at any time. . . .

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[3] GM provides no explanation as to why the 1974-77 booklet omitted a modification clause.

> GM health care coverages have been changed from time to time through the years and are subject to change in the future.
>
> The Corporation reserves the right to amend, modify, suspend, or terminate its benefit Programs by action of its Board of Directors.
>
> GM reserves the right to amend, change or terminate the programs described in this booklet.

In addition to the booklets described above, GM distributed various documents to the 40,000 members of the putative plaintiff class who took early retirement.

Beginning in 1974, GM instituted a program of Special Early Retirement with enhanced benefits for pension eligibles as an inducement for their departure in connection with plant closing, workforce downsizing, or other action initiated by GM. Over the years GM also offered other types of early retirement packages.

Many early retirees signed a "statement of acceptance," evidencing their agreement to accept GM's offer of early retirement. In some of these statements the early retiree affirms that he/she has "reviewed the benefits applicable" to him/her and "accepts them." In exchange, the retiree promises to release GM from liability for certain causes of action potentially connected with the early departure, including claims of age discrimination. Prior to signing these forms, many early retirees were given benefit summaries describing the health care benefits which they would receive during retirement.

In 1987, GM announced modifications in its health care program, to become effective in 1988 for salaried employees, retirees and surviving spouses. Under the modified program, participants who opt for traditional fee-for-service coverage [4] are required to pay an annual $200

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[4] Since 1985 GM has allowed participants to opt for coverage through local Health Maintenance Organizations or Preferred Pro-

individual or $250 family deductible for basic coverage. After the annual deductible is met, participants are responsible for a 20% co-payment for most basic services, until the annual out-of-pocket expense equals a maximum of $500. Combined, the deductibles and co-payments require participants to pay an annual maximum of $750 in medical bills which were previously paid by GM.[5]

III. *Analysis*

It is well established that "ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued." *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 948 (6th Cir. 1990) (quoting *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986)). As explained by committees of both the House and Senate:

> [The] term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

See Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 491 (2d Cir. 1988). Congress rejected the automatic

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vider Organizations. The co-payments and deductibles instituted in 1988 did not apply to these participants. It appears that approximately 85% of the putative plaintiff class opt for traditional fee-for-service coverage.

[5] Several other changes were made in GM's health care program at the same time. For example, vision and hearing aid coverages were eliminated; subsequently they were made available subject to co-payments and deductibles. CMEP deductibles were increased, and GM increased the monthly contribution required of CMEP participants. GM also instituted several benefit increases.

vesting of medical insurance plans because "medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation." *Id.* at 492. These unstable variables prevent accurate predictions of future needs and costs. *Id.*

Although medical insurance benefits do not vest automatically under ERISA, such benefits may vest by agreement between the parties. In *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986), the court held that:

> [T]he parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated. In construing such agreements, courts may draw inferences or make presumptions as this court has done in construing collective bargaining agreements providing welfare benefit plans.

Id. at 1193. Thus, the central issue in this case is whether GM set out in the plan documents an agreement or "private design" to vest health care benefits upon retirement, or provided that such benefits are subject to change.

As the court in *White Farm* indicates, the starting point for determining plaintiffs' rights under GM's health care plan is the "plan documents" themselves. *See also Musto v. American General Corp.*, 861 F.2d 897, 900 (6th Cir. 1988). ERISA requires that every employee benefit plan be established and maintained pursuant to a "written instrument." 29 U.S.C. § 1102(a)(1). A program under which an employer provides medical insurance benefits constitutes such a plan, *see* 29 U.S.C. §§ 1002(1)(A) and (3), and the insurance policies themselves are the "written instruments" required by law. *Musto, id.* at 901. Courts have also looked at written summary plan de-

scriptions (SPDs)[6], required by ERISA 29 U.S.C. §§ 1022 (a)(1) and 1024(b)(1), as evidence of the terms and conditions of employee welfare plans. *Musto, id.* at 904-906 (court analyzed insurance policy, insurance certificates, and relevant SPDs); *see also White Farm,* 788 F.2d at 1193-94 (court relied on SPDs as "indirect evidence" of the plan's terms). Accordingly, in this case I have reviewed the underlying plan documents, summary booklets, and SPDs in order to determine the terms of GM's health care plan for salaried retirees.

The underlying plan documents available here include various contracts and certificates of insurance, and a program statement drafted by GM in 1985. In none of these documents do I find GM's agreement to provide participants with vested health care benefits, and in fact plaintiffs do not rely upon these documents as evidence of such agreement. Rather, plaintiffs point to statements contained in summary booklets distributed by GM or its insurance carriers over the years. As plaintiffs correctly point out, these booklets uniformly contained provisions similar to the following:

> Your basic health care coverages will be provided at GM's expense for your lifetime. . . .

Plaintiffs argue that provisions such as these constitute GM's agreement to provide salaried retirees, and eligible surviving spouses, with free lifetime health care coverage, and GM's agreement not to change that policy post-retirement. I do not agree.

Plaintiffs simply ignore plan provisions wherein GM unambiguously reserved its right to change the plan. For

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[6] By 1977 ERISA had made it mandatory for the administrator of a welfare plan such as GM's to furnish each participant with "summary" descriptions of the plan, "written in a manner calculated to be understood by the average plan participant. . . ." 29 U.S.C. §§ 1022(a)(1) and 1024(b)(1).

example, the very same page of the 1980 booklet cited by plaintiffs expressly warned retirees that:

> GM Health Care coverages have been changed from time to time through the years and are subject to change in the future.

Virtually all booklets contained similar provisions.[7] For example, the 1985 booklet stated that:

> General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet.

These provisions effectively informed plaintiffs that GM's present policy was to pay the full cost of basic health care coverage during plaintiffs' retirement, but that GM reserved the right to change that policy. To show that GM violated the plan when it instituted the 1988 changes, plaintiffs would have to show that GM effectively promised never to change the plan during plaintiffs' retirement. I find no such promise in any of the plan documents. Rather, I find that GM unambiguously reserved the right to change the plan, and thus did not agree in the general plan documents to provide salaried retirees with vested health care benefits.

This reading of GM's health care plan is consistent with the holding of the United States Court of Appeals for the Sixth Circuit in *Musto*, 861 F.2d 897 (1988). In *Musto*, the company's booklets summarizing the group medical insurance plan for retired employees stated that

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[7] The only summary booklet not containing a provision warning employees of GM's right to modify or amend its health care benefit plan was issued in 1974. The next booklet, issued in 1977, clearly contained such a provision. Given that GM employees were generally put on notice of GM's right to modify its health care plan, I do not place great weight on its apparent failure to reiterate such notice in one booklet. *See Moore*, 856 F.2d at 490 (holding that employer's failure to include modification clause in one summary booklet did not defeat such right).

"[t]he Company pays the entire cost of the Plan with respect to Retired Employees." *Id.* at 905. However, the booklets also stated that "[t]he Company does, as it always has, reserve the right to change the Plan and, if necessary, discontinue it." *Id.* The district court, finding these provisions to be in "irreconcilable conflict," held that:

> To read the plan as providing lifetime paid up medical insurance and, at the same time, reserving the right to terminate the benefits at any time constitutes an illusory promise—an express unqualified grant of a right negated by an express unqualified reservation of the right to terminate the grant.

See Musto v. American General Corp., 615 F.Supp. 1483, 1499 (D.C. Tenn. 1985). The court of appeals rejected this analysis, stating that:

> To read this summary as saying that the plan can never be changed in such a way as to mandate retiree contributions for continued medical coverage is to read into the summary something its authors did not put there (a promise to provide lifetime "paid up" medical insurance), while reading out of the summary something that clearly was put there (an express reservation of the right to change the plan). Such a reading violates the basic principle that each provision of a contract should be interpreted as part of an integral whole, to the end that all of the provisions may be given effect if possible.

Musto, 861 F.2d at 906.

In this case, plaintiffs ask me to read into the plan an irrevocable agreement to provide lifetime health care coverage at GM's expense, and to read out of the plan the provisions wherein GM expressly reserved its right to change the plan. Such a reading is precluded by this circuit's holding in *Musto*, which teaches that "where the power to terminate such a welfare plan has been reserved,

it may be exercised. . . ." *Id.* at 907 (quoting *White Farm,* 788 F.2d at 1192 and 1193). *See also Moore,* 856 F.2d at 492, cited with approval in *Musto,* 861 F.2d at 908, n. 6 (upholding employer's right to exercise modification clause notwithstanding employer's promise to provide "lifetime benefits at no cost to employees").

Because GM's general plan documents [8] unambiguously set forth GM's right to modify health care coverages, I find that these documents do not establish GM's agreement or "private design" to vest any particular level of health care benefits upon retirement.

Nevertheless, I do not foreclose the possibility that GM bilaterally contracted to provide vested benefits to early retirees. I make this finding because it appears that some early retirement agreements contain GM's promise to furnish early retirees with a particular level of health care coverage in exchange for the early retiree's promise to, *inter alia,* release GM from liability for certain causes of action. These early retirement agreements may be enforceable under ERISA as independent bilateral contracts or as modifications of GM's health care benefit plan.

GM argues that ERISA preempts early retirees from stating such a claim, citing, *e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 44, 107 S.Ct. 1549, 1551, 95 L.Ed.2d 39, 45-46 (1987); *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1356 (9th Cir. 1984), *cert. denied,* 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); *Lee v. Prudential Insurance Co. of America,* 673 F.Supp. 998,

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[8] Plaintiffs argue that because the modification/termination warnings occur only in the summary booklets, and not in the "underlying plan documents" (*i.e.,* the pre-1985 contracts and certificates of insurance with various insurance companies), they are ineffective. Plaintiffs cannot have it both ways. If they intend to rely on the summary booklets as a source of the alleged promise to provide vested lifetime health care benefits at no cost to retirees, then they must also live with the modification/termination provisions contained in those booklets.

1002 (N.D. Cal. 1987). In contrast, plaintiffs contend that the early retirement agreements are enforceable bilateral contracts under ERISA, citing, *e.g.*, *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989) ("ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' and 'to protect contractually defined benefits' ").

None of the cited cases addresses a situation where, as here, an employer allegedly agrees, apart from its regular plan, to provide a discrete group of employees with vested health care benefits in exchange for defined consideration. In the absence of controlling authority to the contrary, I will allow the early retirees to state such a claim in the circumstances of this case. Accordingly, GM's motion to dismiss Count IV of the complaint is DENIED insofar as that motion pertains to early retirees.

I also find that there are genuine issues of material fact as to (1) which "early retirement agreements" constitute bilateral contracts; (2) the terms of those contracts; and (3) whether the 1988 changes constitute a breach of those contracts. These factual issues preclude summary judgment for or against the early retirees as a class.

Accordingly, GM's motion for partial summary judgment is GRANTED as to general retirees but DENIED as to early retirees. Plaintiffs' motion for partial summary judgment is DENIED.

Finally, I GRANT GM's motion to dismiss Count III of the complaint inasmuch as the United States Court of Appeals for the Sixth Circuit has clearly held that "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan," *see Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir. 1990) (quoting *Musto*, 861 F.2d at 911).

IT IS SO ORDERED.

APPENDIX I

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 94-1896 to 94-1898, 94-1937

ROBERT B. SPRAGUE, *et al.*,
Plaintiffs-Appellees/
Cross-Appellants,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellant/
Cross-Appellee.

Nov. 7, 1996

Before: MARTIN, Chief Judge; MERRITT, KENNEDY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE and COLE, Circuit Judges.

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of these cases en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is ORDERED, that the previous decision and judgment of this court are vacated, the mandate

is stayed and the case is restored to the docket as a pending appeal.

It is further ORDERED that the appellees/cross-appellants file a supplemental brief not later than Friday, December 20, 1996, and the appellant/cross-appellee file a supplemental brief not later than Monday, February 10, 1997. Reargument will be scheduled for Wednesday, April 23, 1997.

APPENDIX J

STATUTES AND REGULATIONS INVOLVED

STATUTES

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*

Section 3, 29 U.S.C. § 1002. Definitions.

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

Section 102, 29 U.S.C. § 1022. Plan description and summary plan description.

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of

this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

Section 402, 29 U.S.C. § 1102. Establishment of plan.

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(b) Requisite features of plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * * *

Section 502, 29 U.S.C. § 1132. Civil enforcement.

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

* * * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

* * * *

REGULATIONS

Sec. 2520.102-1—Plan description.

The plan description required by section 102 of the Act shall consist of a summary plan description as described in section 102(b) of the Act and §§ 2520.102-2 and 2520.102-3 thereunder.

Sec. 2520.102-2—Style and format of summary plan description.

(a) Method of presentation. The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references and a table of contents.

(b) General format. The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions, and other restrictons of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

* * * *

Sec. 2520.102-3—Contents of summary plan description.

Section 102 of the Act specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraphs (j) through (n):

* * * *

(j) The plan's requirements respecting eligibility for participation and for benefits. The summary plan

description shall describe the plan's provisions relating to eligibility to participate in the plan, such as age or years of service requirements, and the items listed in paragraphs (j)(1) or (2) of this section as appropriate:

* * * *

(2) For employee welfare benefit plans, it shall also include a statement of the conditions pertaining to eligibility to receive benefits, and a description or summary of the benefits. In the case of a welfare plan providing extensive schedules of benefits (a medical care plan, for example), only a general description is required if reference is made to detailed schedules of benefits which are available without cost to any participant or beneficiary who so requests;

* * * *

(l) For both pension and welfare benefit plans, a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

* * * *

Supreme Court, U.S.
FILED
MAY 6 1998
CLERK

(3)

No. 97-1639

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT D. SPRAGUE, ET AL., PETITIONERS

v.

GENERAL MOTORS CORPORATION, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Applying this Court's precedents construing ERISA and legal principles recognized by all other circuits, the court of appeals determined as a matter of fact that plaintiffs failed to sustain their burden of proof that General Motors Corporation promised to provide vested and unchangeable medical benefits to its retirees. The court of appeals also determined that the class alleged in this case failed to meet the prerequisites of Fed. R. Civ. P. 23(a) because of fundamental factual variations in the situations of the putative class members.

The questions presented are as follows:

1. Whether a purported class of plaintiff retirees satisfies the typicality and commonality standards of Rule 23(a) when the class members retired at different times and places over a period of 20 years, obtained differing formal and informal plan summaries, and received varying oral communications necessitating individualized proof at trial.

2. Whether an employer that has reserved its statutory right to amend its medical plan in formal plan documents distributed to employees, repeatedly exercised that right, and accurately described the current terms of its medical plan in written and oral communications is entitled under ERISA to modify the medical plan to increase copayments and deductibles required of plan participants.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation advises the Court that the following is a list of GM's non-wholly-owned subsidiaries.

Asset Leasing GMbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator, Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.

RULE 29.6 STATEMENT-Continued

DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in PanAmSat Corporation.

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STATEMENT

In this purported class action, plaintiffs, retired salaried employees of General Motors Corporation, claimed that GM violated the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, by modifying its medical plan to require plaintiffs to contribute to the cost of their medical care through increased copayments and deductibles. The Sixth Circuit, sitting en banc, determined that plaintiffs failed to present any evidence that GM ever promised to provide vested and unchangeable medical benefits. To the contrary, the evidence showed that GM repeatedly and unambiguously reserved its right to amend its medical plan in formal plan documents and summary booklets and certificates given to employees over a period of 20 years. That fact-bound determination, which rests on legal principles previously announced by this Court, and which reflects no disagreement with the law recognized in any other circuit, is plainly unworthy of further review.

Both before and after the plan amendments at issue in this litigation, GM maintained a medical plan of undisputed high quality. In the words of the district court, members of the plaintiff class "conceded that, even after the 1988 changes, they continue to enjoy a good health care program." Pet. App. 119a. When faced with exploding health care costs, GM did not terminate or drastically scale back its plan; instead, it continued to pay for most of the medical expenses incurred by plan participants, while also creating incentives for the rational use of limited health care resources. Plaintiffs nonetheless asserted in the courts below that—unlike tens of thousands of salaried GM employees and other retirees—they alone had an entitlement to unchangeable medical benefits for the rest of their lives, and that none of the costs of those benefits could be charged to them. The Sixth Circuit correctly rejected these claims on the ground that employers are "free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995).

1. The plan documents.

Based on its review of the voluminous record in this case, the en banc court of appeals affirmed the district court's ruling that "the plan unambiguously reserved GM's right to amend or terminate the plan." Pet. App. 3a-4a & n.2, 13a, 17a-18a, 233a-

236a. From its inception in 1964, GM's medical program was described in virtually all plan documents as subject to change. Before GM became self-insured, the company provided basic health care coverage for active employees and retirees through group medical insurance. The insurance certificates—which were distributed to "each covered person" (Pet. App. 3a, 227a; C.A. App. 194, 629-649, 1952; Tr. 65-74 XII(B))—stated unequivocally that the insurance was not "paid-up," and that GM "reserves the right to modify, revoke, suspend, terminate, or change the Plan, in whole or in part, at any time." C.A. App. 1955-2024, 2247. The underlying insurance policies and riders, which were made available to all employees (*id.* at 643, 1759, 1828, 1839, 1869, 1884, 1936), provided that "all insurance hereunder shall automatically cease immediately upon the discontinuance of this Policy" (*id.* at 1947-1955); the policies could be terminated upon GM's written notice. *Ibid.*

When GM became self-insured in 1985, its "plan expressly stated that '[a]ny rate of payment by the enrollee and any other terms and conditions of the Program may be changed at any time by the Corporation.'" Pet. App. 19a n.10. This statement made it abundantly clear that GM did not waive or relinquish the right Congress gave all employers under ERISA to amend or alter an employee welfare plan. Extrinsic evidence confirmed that GM at all times intended to preserve its right to amend the plan and never intended to vest medical benefits at any particular level. C.A. App. 836, 862, 868-869; VIII(B) Tr. 28-29; Pet. App. 199a. In the words of the en banc court, "the district court found, and we agree, that all versions [of the medical plan] clearly reserved to GM the right of amendment or termination." Pet. App. 3a-4a n.2.

2. The summary plan descriptions.

Over a period of two decades, and commencing long before any of the plaintiff class members retired, GM distributed hundreds of thousands of summary booklets and summary plan descriptions, which described the then-existing terms of its medical plan and reiterated the company's right to make plan amendments. As the Sixth Circuit explained (Pet. App. 27a), "most of the summary plan descriptions issued to the plaintiffs over the years unambiguously reserved to GM the right to amend or terminate the plan." In summary booklets issued in 1965, 1968, 1971, 1977,

1980, and 1985, GM made clear that the company "reserves the right to modify, revoke, suspend, terminate, or change the Program, in whole or in part, at any time"; that "GM health care coverages have been changed from time to time through the years and are subject to change in the future"; and that GM "reserves the right to amend, change or terminate" the plan. Pet. App. 5a; C.A. App. 1355, 1419, 1710, 1745, 1768, 2004, 2247, 1821, 1849, 1860, 1897, 1907, 1938. The two SPDs distributed in 1985 to both active employees and retirees exemplify these reservations. Each stated, beginning on its very first page in bold italicized print, that the company reserves the right to "amend, change, or terminate the Plans"—a warning repeated five different times. C.A. App. 1355, 1419, 1897, 1907, 1938. Only three of the 11 summary booklets omitted this language, and those documents pointedly stated that the "[a]ctual governing provisions and specific exclusions are contained in the applicable benefit certificates." *Id.* at 1245, 1249, 1255, 1276, 1299, 1307, 1773, 1783, 1788, 1800, 1828. As explained above, the insurance certificates, distributed to all covered employees, expressly reserved GM's right to modify or terminate the plan.

The district court accordingly found that, in these summary booklets, "GM unambiguously reserved its right to change the plan." Pet. App. 233a-236a. It also found that "GM employees were generally put on notice of GM's right to modify its health care plan." *Id.* at 234a n.7. Undisputed testimony and documentary evidence confirmed that before any of the plaintiffs retired and throughout the time period relevant to this litigation, both active employees and retirees received notice from the plan documents made available to them and the certificates and summary booklets actually distributed to them. *E.g.*, Pet. App. 144a, 158a-160a, 163a, 168a, 173a, 177a-179a; C.A. App. 740-742, 745-746, 750, 753-755, 844, 855-857, 861-862, 871-872, 2233-2234, 2235-2236, 2237-2238. Only a handful of retirees testified at trial in this case, but they repeatedly acknowledged receiving warnings of GM's right to amend before retirement and many admitted to actually reading the warning language. C.A. App. 391-A, 392, 400, 404-405, 407, 715-716, 724, 735, 777-779, 790, 807, 845-846, 862, 2184, 2194. In short, as the court of appeals observed, GM had a "clearly-stated right to amend—a right contained in the plan to which the plaintiffs had access and in many of the summaries they

were given" (Pet. App. 27a), a right reiterated "many times" throughout the period at issue in this litigation (*id.* at 29a).

3. GM's continuous amendment of the plan.

As the summary booklets showed on their face, GM's medical plan changed fundamentally over the years. The evolving plan contained numerous requirements for copayments, deductibles, premium contributions, and capped or excluded medical expenses. *E.g.*, C.A. App. 1366-1375, 632-640; Pet. App. 125a-127a. Employees therefore shared the cost of medical care in many ways; employee contributions and other terms frequently changed; and no one ever suggested that GM lacked the right to make those changes. Pet. App. 125a-127a; C.A. App. 1249-1255, 1301-1304, 1366-1367, 1722, 1738-1739.

From time to time, GM both expanded medical coverage and reduced benefits or added charges. For example, beginning in 1964, GM required deductibles and copayments for x-rays, electrocardiograms, and cancer treatments. Pet. App. 125a. Beginning in 1969, GM required copayments for prescription drugs, an amount raised twice prior to the plan changes challenged in this suit. *Id.* at 126a. When GM added dental coverage in 1974, it also required copayments ranging from 15% to 50%. *Ibid.* Likewise, GM's vision care coverage, added in 1977, required copayments that varied over time. *Ibid.* Beginning in 1985, employees who sought traditional fee for service medical treatment had to obtain prior approval for services or pay deductibles and copayments. C.A. App. 1366, 1908. Employees electing health care benefits for visits to doctors' offices were required to subscribe to "comprehensive" medical coverage, which always required premium payments, deductibles and copayments. Pet. App. 227a.

In response to dramatically increasing health care costs, which nearly tripled between 1975 and 1985 (C.A. App. 2227), GM announced a further modification of its health care program effective in 1988. This change required participants who elected certain coverage options to pay deductibles and make copayments. Those charges could be avoided, however, by electing HMO coverage. C.A. App. 2029-2032; Pet. App. 230a-231a n.4. These requirements brought the GM plan into line with health care programs across the nation that have made increasing use of

deductibles and copayments to improve efficiency and conserve limited health care resources. At the same time that these new charges were imposed for certain options, GM expanded medical coverage in several respects and voluntarily raised retirement income benefits. Pet. App. 128a n.6. GM also added hospice care, increased dental and mental health coverages, and enlarged coverages for prescription drugs and medical equipment. *Ibid.* The 1988 changes thus did not terminate the plan; to the contrary, the plan remains one of the most generous health care plans in the nation. Plaintiffs were required to make only modest contributions typically required of health care plan beneficiaries today. *Id.* at 8a.

4. Plaintiffs' claims.

Plaintiffs—salaried employees who retired between 1974 and 1988 either as general or early retirees—brought suit under ERISA to block GM's 1988 plan amendments, claiming that GM's action violated the terms of the plan, breached contractual duties, and violated principles of estoppel and fiduciary duty. The main thrust of each claim was that GM had bound itself to provide retirees and their spouses with vested health coverage for life, entirely at GM's expense, and thus that the GM medical plan could never be changed in any manner that increased charges to participants.

In making these extravagant claims, the general retirees seized on statements in the summary plan descriptions which confirmed that participation in the program would continue after retirement and (in contrast to retiree life insurance) would not automatically terminate at a particular age. The summary booklets describing current plan terms stated variously that, under the existing medical plan, "you may keep your basic hospital, surgical and medical expense coverages in effect[;] * * * GM will pay the full monthly premium or subscription charge for such coverages," or that participants would receive "coverages" at "Corporation expense for your lifetime." Pet. App. 4a. The early retirees also cited similar descriptions of existing plan terms made orally or in informal written summaries. *Id.* at 7a-8a. The early retirees claimed that these informal statements constituted promises that were integrated into "statements of acceptance" used to memorialize their retirement. *Id.* at 24a-25a.

There was no dispute at trial that GM's statements were fully accurate descriptions of the terms of the GM plan as it then

existed—terms that remained in effect for some 20 years. It was also undisputed that retirees were never told that GM relinquished its reserved right to amend the plan, a right set forth repeatedly in the formal plan documents and in summaries distributed to employees. Reviewing all of GM's formal and informal statements, which said nothing about the level of future copayments or deductibles, the court of appeals determined that "[n]either the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." Pet. App. 22a-23a. "GM never told the plaintiffs that their benefits were vested or fully paid-up." *Id.* at 27a. GM's statements were "undeniably true under the terms of GM's then-existing plan," and constituted "accurate representations of its current program." *Id.* at 29a, 31a.

Far from showing that GM had "given out * * * inaccurate information" (Pet. App. 31a), GM's informal written summaries often repeated the warning about future plan changes and put the retirees "on notice of GM's right to modify its health care plan" (*id.* at 9a, 234a n.7). For example, when "a small number of early retirees explicitly asked GM representatives about future changes to health care benefits," the answers "were accurate—benefits could be changed in the future" (*id.* at 7a-8a). Some prospective retirees received informal summaries reiterating that GM reserved the right to "amend, change or terminate the Programs described" (*id.* at 144a, 182a). Others were told orally that the speaker "could only attest to what was currently in effect" and that "benefits were subject to change." *Id.* at 144a. See also *ibid.* (prospective retirees were told "very specifically [that] benefits were subject to change"); *id.* at 163a-164a ("Because General Motors reserves the right to amend or terminate its benefit plans and to amend its employment policies, your actual benefit entitlement may be affected by future plan amendments"); *id.* at 173a, 179a ("The [benefit] summary is not intended to and does not create any contractual obligations. General Motors reserves the right to amend or terminate programs"); *id.* at 178a (on those occasions when prospective retirees asked whether health care coverages could be changed, "[t]he response generally went along the vein that it could be changed, either improved or some, you know, items taken away").

5. The decisions below.

The district court rejected the claims of the general retirees, holding that "[b]ecause GM's general plan documents unambiguously set forth GM's right to modify health care coverages * * * these documents do not establish GM's agreement or 'private design' to vest any particular level of health care benefits upon retirement." Pet. App. 236a.[1] However, the district court subsequently certified a class of early retirees and ruled in their favor, concluding that various informal statements made over a period of 20 years were sufficient to override GM's reserved right to amend and to vest medical benefits for this group of retirees. *Id.* at 219a. The district court's holding in favor of the early retirees shattered what had been GM's uniform health care program for salaried employees, froze health care at retirement for a favored class, and created numerous subgroups of beneficiaries who were entitled to differing levels of benefits. The court issued an injunction that precluded GM from increasing copayments or deductibles under its health care plan.

The Sixth Circuit, sitting en banc, affirmed the district court's ruling rejecting the claims of the general retirees, but reversed the ruling in favor of the early retirees. Pet. App. 17a-32a. The court of appeals held that the district court had abused its discretion in certifying a class of early retirees because of fundamental differences in the factual predicate for each retiree's claim. *Id.* at 11a-17a. Applying legal principles announced in this Court's recent opinions, the court of appeals further held that the individual early retirees lacked valid claims on the merits under ERISA. Based on its detailed review of the record, the court determined that GM had reserved its right to amend its medical plan and never promised to vest medical benefits at any particular level. The court also

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[1] The district court's ruling rejecting the claims of the general retirees came after extensive document discovery and the deposition of GM officials most knowledgeable about the GM plan. C.A. App. 36-50, 157-172, 696-703. Before ruling, the district court received detailed evidence concerning the evolution of the plan and the charges imposed on plan participants through periodic amendments. *Id.* at 628-649. Following the presentation of a complete trial record, the district court reaffirmed its decision rejecting the claims of the general retirees. Pet. App. 89a.

determined that the early retirees were on notice of GM's right to amend and had not been misled by the company's accurate descriptions of existing plan terms. *Id.* at 23a-31a.

Eight of the 13 members of the en banc court joined in the majority opinion written by Judge Nelson. Two more judges, Judges Lively and Merritt, partially concurred in that opinion, concluding that the general retirees had no valid cause of action. Judge Merritt also concurred in the majority holding that the early retirees could not maintain a class action. Pet. App. 33a-37a. The dissenting opinion of Judge Martin (joined by two other judges) disagreed with the majority not on the interpretation of judicial precedent, but rather on the proper characterization of the facts of this particular record. *Id.* at 38a-50a. On February 4, 1998, after reviewing extensive argument from plaintiffs concerning the certworthiness of this case, Justice Stevens declined to grant a stay of mandate or extend the lower court's stay.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Decision Applies Settled Law To The Facts Of This Particular Case And Does Not Conflict With Prior Decisions Of This Court Or Any Other Circuit.

This case received thorough consideration from the Sixth Circuit over a three-year period. In the end, the majority of the en banc court disagreed with the dissenting judges not over legal principles but over the interpretation of the unique facts presented by a voluminous record. The majority determined that plaintiffs had adduced *no* evidence that GM made promises to vest medical benefits at any particular level; to the contrary, the company repeatedly and unambiguously notified its workforce of its statutory right to amend. Pet. App. 5a, 8a, 20a. "Neither the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." *Id.* at 22a-23a. The dissenting judges, overlooking evidence demonstrating the pervasiveness of GM's reservations of its right to amend, characterized GM's reservations as "rather tepid" or "inconsistent," and simply assumed that GM made "promises" of unchanging medical benefits. *Id.* at 44a-45a. The dissenting judges nowhere responded to the majority's demonstration that GM's statements were *descriptive*, not promissory, and were "undeniably

true under the terms of GM's then-existing plan." *Id.* at 29a. Wholly apart from the merits of this debate, this is a clear occasion for application of the restriction stated in this Court's Rule 10: certiorari should not be granted to review purportedly "erroneous factual findings." This case-specific determination lacks general precedential significance no matter how labeled or characterized. See *NLRB* v. *Hendricks County Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) ("we are presented primarily with a question of fact, which does not merit Court review"); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts").

Whether particular statements by an employer (considered in context) amount to promises of vested benefits, and whether employees could "reasonably rely" on those statements given the employer's reservation of rights, are questions that are wholly case-specific. Whether the record demonstrates sufficient commonality and typicality among class members to justify class certification under Rule 23 is likewise a question dependent on the particular circumstances of the case. As indicated by the many precedents cited in the opinion of the Sixth Circuit, this Court repeatedly has denied certiorari when presented with substantially identical fact-bound claims brought under ERISA. See Pet. App. 18a-31a, citing *Musto* v. *American Gen. Corp.*, 861 F.2d 897 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), cert. denied, 510 U.S. 870 (1993); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994), cert. denied, 514 U.S. 1057 (1995); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), cert. denied, 514 U.S. 1050 (1995); *Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995); and *Pocchia* v. *NYNEX Corp.*, 81 F.3d 275 (2d Cir.), cert. denied, 117 S. Ct. 302 (1996). There is no reason for a different disposition here.

It is equally clear that the Sixth Circuit did not disregard principles announced in this Court's prior decisions. To the contrary, the court of appeals carefully applied this Court's latest ERISA rulings. See Pet. App. 12a, 18a, 23a, 27a-31a, discussing and applying *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995); *Lockheed Corp.* v. *Spink*, 116 S. Ct. 1783 (1996); *Varity Corp.* v. *Howe*, 116 S. Ct. 1065 (1996); *Inter-Modal Rail*

Employees Ass'n v. *Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513 (1997); and *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980). The court below also faithfully applied the class action criteria set forth in *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982). Given this Court's recent pronouncements under ERISA, there is no practical reason for a grant of certiorari. As Rule 10 makes clear, the Court will not grant certiorari when an asserted error consists of "the misapplication of a properly stated rule of law."

Moreover, the Sixth Circuit's decision does not conflict with any ruling of another court of appeals. To the contrary, the en banc opinion cited rulings of federal courts of appeals from across the country for the black-letter legal principles relied on here. *The Sixth Circuit did not express disagreement with a single decision from another jurisdiction.* Pet. App. 13a-32a. As explained on pages 15-24, *infra*, there is not the slightest basis in decisions from other circuits to conclude that another court of appeals would have decided *this* case differently. This Court will have numerous opportunities in the future to address issues of vesting. It should not attempt to do so in the absence of a genuine conflict among the circuits that illuminates competing considerations of law and policy.

It would be especially inappropriate to do so in a case such as this one, which was correctly decided on its own record. Ten judges agreed with the trial judge that the general retirees have no valid claim. Nine judges concurred in the fact-bound holding that the class action was improper. The en banc court's rejection of the claims of the individual plaintiffs was also correct, based on settled precedent that the dissent did not dispute. The court of appeals did not question the availability of causes of action for breach of an ERISA plan, breach of contract, breach of fiduciary duty, and estoppel, but found that plaintiffs failed to adduce evidence sufficient to support any such cause of action. Pet. App. 18a-31a. There is no reasonable likelihood that a majority of this Court would disagree with these fact-bound rulings. It is particularly unlikely that this Court would disagree with the class action ruling in this case, which substantially curtails its practical importance.

Finally, the decision of the court below is a fair and reasonable disposition of this protracted litigation. As a humane alternative to layoffs, GM offered voluntary early retirement to employ-

ees with generous pension benefits. After retirement, both early and general retirees continued to have access to a company-financed health care plan of undisputed quality. The modest co-payments and deductibles they now pay, for some medical plan options, are typical of those paid by almost all medical plan beneficiaries today.[2] As the court of appeals explained, retirees were not misled by GM's conduct. GM reserved its statutory right to amend long before any of the plaintiffs retired, and repeated that disclosure throughout the time period at issue in this litigation. Employees knew from firsthand experience that GM's plan was a living, changing health care program and that GM could (and frequently did) amend it to add charges and payments. Significantly, GM's adoption of copayments and deductibles has "not deterred acceptance of early retirement. In fact we have had record retirements in the last two years." C.A. App. 808.

In these circumstances, plaintiffs' lawsuit amounted to a game of "gotcha"—a demand for *free and unchangeable* medical benefits unavailable to any other GM employee or retiree on the theory that "the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." Pet. App. 29a. But Congress did not require employers "to begin every communication to plan participants with a caveat." *Ibid.* If accepted by federal courts, such opportunistic claims "would create disincentives for employers to offer benefits in the first place. Such a result is not in the interests of employees generally and it is certainly not compatible with the goals of ERISA." *Id.* at 25a.[3]

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[2] When GM made its plan changes in 1988, 95% of company-sponsored plans had deductibles and 90% had copayments. Rice, *Containing Health Care Costs in the United States*, 49 Med. Care Rev. 19, 26 (Spr. 1992). Copayments and deductibles can be avoided completely by enrolling in GM's HMO program. Pet. App. 127a, 230a-231a n.4.

[3] As the Second Circuit observed in *Moore* v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988): "Automatic vesting was rejected [by Congress] because the costs of [health] plans are subject to fluctuating and unpredictable variables. * * * [M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These

II. The Sixth Circuit Applied Law Recognized In All Circuits When Resolving The Fact-Bound Class Action Claims In This Case.

Plaintiffs contend (Pet. 20-21) that the Sixth Circuit erred in applying Rule 23(a) to the facts of this particular case. As the court's opinion shows on its face, however, the Sixth Circuit faithfully adhered to this Court's precedents interpreting Rule 23(a) as well as settled law articulated in numerous prior appellate decisions. Pet. App. 11a-17a. The court of appeals correctly concluded that the variations in the situations of individual class members, and the diversity of factual and legal issues raised by their claims, precluded entry of a class-wide injunction.

The early retirees based their claims to class-wide, unchanging healthcare benefits on literally thousands of oral and written statements made by hundreds of different GM officials, often in one-on-one conversations, at more than 160 GM plants across the country over a period of nearly 20 years. Under governing contract law, each such claim required individualized consideration to "determine the scope of [any] promise with some precision," as well as to rule on GM's defenses. *Farnsworth on Contracts* § 3.1 at 161, § 3.27 at 353-355 (1990). These contract claims could not be resolved in plaintiffs' favor without examining the specific oral and written statements made to each retiree. Plaintiffs' breach of fiduciary duty and estoppel claims also required individualized evaluation, as the Sixth Circuit explained. Pet. App. 15a, 31a.

In addition, the class members included persons who received and read statements expressly reserving GM's right to amend the health plan (Pet. App. 144a, 166a); persons who were personally informed that the health benefits were not vested (*id.* at 144a); persons who did not sign the statements of acceptance that plaintiffs claim embody their contracts (*id.* at 12a); persons who

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unstable variables prevent accurate predictions of future needs and costs." Accordingly, "Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans." *Adams* v. *Avondale Indus. Inc.*, 905 F.2d 943, 947 (6th Cir.) (discussing legislative history), cert. denied, 498 U.S. 984 (1990), cited with approval in *Curtiss-Wright*, 514 U.S. at 78.

received different summary booklets over a 20-year period, most of which expressly reserved GM's right to amend the plan (pp. 2-4, *supra*); and persons who took or agreed to take early retirement *after* GM announced the changes in its health care program in 1987 (Pet. App. 124a). The descriptions of the health benefits they received were extraordinarily diverse, ranging from general predictions that health care would "be continued," or would be "like" that given to "active employees," to statements that health care would not change "drastically" or that "coverages" would be financed by GM. *Id.* at 151a-152a, 160a-164a, 167a-168a, 173a-179a.

As this Court held in *General Tel. Co.* v. *Falcon*, 457 U.S. 147 (1982), Rule 23(a) forbids certification in such a case. In *Falcon*, this Court reversed certification of an employee class action alleging that the employer had adopted a general "practice" that resulted in unlawful discrimination. The class failed to meet the "commonality" and "typicality" requirements of Rule 23(a) because plaintiffs' claims required individualized consideration. Class litigation is improper, the Court held, unless "questions of law [are] applicable in the same manner to each member of the class" and class members "suffer the same injury." *Id.* at 155-156. Accord *Lewis* v. *Casey*, 116 S. Ct. 2174, 2184 & n.7 (1996) (recognizing that it is improper to grant a class-wide remedy ranging beyond the claims of individual plaintiffs where other class members have not been shown to have suffered the same injury); see also *id.* at 2202 (Souter, Ginsburg, and Breyer, JJ., concurring). The Sixth Circuit properly rejected plaintiffs' effort to litigate discrepant individual issues on a class basis, in reliance on the testimony of a handful of people—each of whom recited widely different facts and circumstances.

Plaintiffs nonetheless contend (Pet. 19-20) that the Sixth Circuit impermissibly applied the "predominance" test of Rule 23(b)(3) to the district court's Rule 23(b)(2) certification of a class of early retirees. That is pure fantasy. The Sixth Circuit did not even refer to "predominance" or Rule 23(b)(3), limiting its analysis to the threshold requirements of commonality and typicality set forth in Rule 23(a).

As the court of appeals noted, the district court certified the early retiree class only after its decision in *Sprague I*, and "[t]he

issues that remained after *Sprague I* were anything but common." Pet. App. 13a. Resolution of those issues rested on the early retirees' theories of bilateral contract, fiduciary duty, and estoppel, the resolution of which, as discussed above, would require highly individualized proofs. Plaintiffs' complaint (Pet. 20) that the court of appeals "focused almost exclusively on differences among individual classmembers," instead of on "legal and factual issues common to the class," simply disputes the court's well-supported determination (Pet. App. 14a-15a) that there *were* no such common issues but only "myriad variations" of individual circumstances.

The Sixth Circuit's ruling that plaintiffs did not satisfy Rule 23(a)'s threshold requirements for a class action is unexceptionable and fully consistent with this Court's recent statement, in *Amchem Prods., Inc.* v. *Windsor*, 117 S. Ct. 2231, 2248 (1997), that both subdivisions (a) and (b) of Rule 23 preclude a class action where the proposed class lacks "sufficient unity." It is also consistent with the rejection of similar ERISA class action claims by other courts of appeals. *E.g.*, *Retired Chicago Police Ass'n* v. *City of Chicago*, 7 F.3d 584, 596-598 & n.17 (7th Cir. 1993) (refusing to allow class litigation of vesting claims that depended on extra-plan communications that varied over time and were not "standardized"); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 953 (8th Cir. 1994) ("estoppel * * * must be applied with factual precision and therefore is not a suitable basis for class-wide relief"); *Hudson* v. *Delta Air Lines*, 90 F.3d 451, 457 (11th Cir. 1996) (holding that contract and fiduciary duty claims under ERISA may not be litigated in class format when based on "individualized" informal statements that are "not susceptible to class-wide proof"); *Frahm* v. *Equitable Life Assurance Soc'y*, 137 F.3d 955, 956-957 (7th Cir. 1998) (following the Sixth Circuit's ruling here and rejecting "person-specific" class claims of early retirees under ERISA).

Plaintiffs' contention (Pet. 21) that the Sixth Circuit's decision conflicts with *Forbush* v. *J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993), and *Adamson* v. *Bowen*, 855 F.2d 668 (10th Cir. 1988), is frivolous. In *Forbush*, a single question of law determined the defendant's liability to all plaintiffs—whether "Penney's general practice of overestimating social security benefits" complied with the applicable statute. Individual "calculations" were required only to ascertain the "awards" of damages that would be

made to class members. 994 F.2d at 1106. The court also stressed that it was addressing the use of class litigation only "at the outset," at "this [preliminary] stage of the litigation." *Ibid.* Similarly, in *Adamson*, the class claim was that a federal agency adopted a uniform "policy of nonacquiescence" with regard to Tenth Circuit law on the proper weight to be given to physicians' reports in social security disability hearings. 855 F.2d at 675. Obviously, those decisions provide no support for entry of a class-wide injunction sustaining the claims of tens of thousands of class members on the merits, where liability could not be imposed without individualized evaluation.

III. The Sixth Circuit's Factual Determination That GM Never Promised To Vest Benefits Does Not Conflict With The Law In Any Other Circuit.

In challenging the Sixth Circuit's holding that GM's plan documents and SPDs do not vest benefits, plaintiffs begin with the improbable assertion that the ruling below conflicts with no fewer than 22 decisions of other courts of appeals. Pet. 12-15 & n.3. On the face of it, however, this contention is insupportable. Although plaintiffs called to the Sixth Circuit's attention virtually all of the vesting cases now relied upon in the petition, the en banc majority nowhere suggested that it meant to reject the rule of any other court of appeals. Equally significant, the *dissenting* judges below did not regard plaintiffs' authority from other circuits to be apposite; none of the dissenting opinions cited *any* of the purportedly conflicting decisions offered by plaintiffs, or indicated that the majority's rule differed from the approach taken by any other court of appeals. Like the dog that did not bark, this silence is a clear tip-off that plaintiffs' contention lacks substance.

In fact, plaintiffs' assertion of a conflict is premised on a plain misstatement of the record. Plaintiffs begin with the assumption that the SPDs here made "express promises" of free and unchangeable health care (Pet. 12), and the petition proceeds to discuss cases that deal with the rules applicable to such promises. ***But the foundation for the holding below was the case-specific finding that GM made no such promises.*** The court of appeals thus expressly concluded that "[n]either the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." Pet. App. 22a-23a. See *id.* at 20a

(the SPDs simply described "the terms of the current plan"); *id.* at 21a (citation omitted) ("'[t]o read this summary as saying that the plan can never be changed in such a way as to mandate retiree contributions for continued medical coverage is to read into the summary something its authors did not put there (a promise to provide lifetime "paid up" medical insurance)'"); *id.* at 27a ("GM never told the plaintiffs that their benefits were vested or fully paid-up").[4] Given this factual determination, the first question presented in the petition—whether "express promises of lifetime health care in ERISA SPDs vest benefits at retirement" (Pet. i)—simply is not raised by this case. And assertions of a conflict necessarily are spurious because, on this record, plaintiffs would not prevail in *any* circuit.[5]

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[4] This fact finding plainly was correct. Read in context, the "lifetime" SPD language relied upon by plaintiffs (at Pet. 5) did nothing more than accurately describe the health plan *as it existed at the time of the SPDs' distribution*. The first sentence of the health plan descriptions in the 1977 and 1980 versions of "Your GM Benefits"—the SPDs upon which plaintiffs principally rely—described the health benefits *then available* both to active employees and to retirees (see C.A. App. 1249, 1301); there can be no suggestion that this description promised either group that those benefits would not be changed in the future. The "lifetime" sentence upon which plaintiffs focus appeared in the subsequent portion of the SPD dealing with retirement, under the subhead "Other Benefit Program Coverages—After Retirement." C.A. App. 1317-1318, 1263-1264. This section described the effect of retirement on a workers' participation in *all* of GM's welfare and pension programs. In this setting, the sentence seized upon by plaintiffs obviously meant only that retirement would not terminate entitlement to health plan benefits; it did not suggest that those benefits—made available on the same terms to active and retired employees—never would be changed for retirees. See *Gable* v. *Sweetheart Cup, Inc.*, 35 F.3d 851, 857-858 (4th Cir. 1994) ("[b]enefit descriptions cannot be translated into guarantees that benefits will never be altered").

[5] Plaintiffs are wrong in contending (at Pet. 15) that other courts have held that "phraseology" similar to that in GM's SPDs gives rise to vested rights. Two of the decisions that plaintiffs cite for this proposition, *Diehl* v. *Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996), and *Stewart* v. *KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993), involve the interpretation of collective bargaining agreements; as we explain below

The Sixth Circuit did not, as plaintiffs suggest, adopt a rigid formula to determine whether benefits are vested. Pet. 16. To the contrary, the Sixth Circuit recognized that "[e]mployers may vest welfare benefits if they choose to do so" (Pet. App. 18a), that an "employer may contractually cede its freedom" to change its plan (*ibid.*), that an employer may vest benefits either "by agreement or by private design" (*ibid.*), that "statements in a summary plan are binding * * * if such statements conflict with those in the plan itself" (*id.* at 19a), and that ERISA plaintiffs can have viable causes of action for breach of plan terms, breach of contract, promissory or equitable estoppel, or deviation from fiduciary duty (*id.* at 23a-31a). The court of appeals did not give a limited definition to any of these causes of action, nor did it narrowly circumscribe the kind of evidence that would suffice to support vesting.[6] The court's fact-bound resolution of this particular case does not conflict with the law in any other jurisdiction.

1. In nevertheless trying to establish disarray in the lower courts, plaintiffs first contend that "the Sixth Circuit's holding that the presence of both lifetime and reservation of rights language in the same SPD renders the plan unambiguous against vesting ([Pet. App.] 20a) is squarely in conflict with the decisions of other circuits." Pet. 12-13. The question of how to reconcile provisions in an SPD that both promise unchanging lifetime benefits and

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(at 18-19, 22), such cases are inapposite here. In the remaining decision relied upon by plaintiffs, *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), the employer did not deny that the plan documents could be read to vest benefits; instead, the employer relied "exclusively" on its reservation-of-rights provision. *Id.* at 950. The Eighth Circuit thus did not even bother to state the language that was said to promise vested benefits. See *ibid.* (emphasis in original) (paraphrasing plan to state that "benefits *will be* provided until the retiree dies"). In contrast to the present case (see p. 2, *supra*), the plaintiffs in *SIPCO* adduced "overwhelming extrinsic evidence" that the employer actually "intended" that benefits "would vest," including testimony from the "President and Chief Executive Officer." *Id.* at 949-952.

[6] Plaintiffs admitted in their stay application in the Sixth Circuit (at 5) that the court of appeals did "not specify any particular formula that would guarantee that benefits would be rendered 'forever unalterable.'"

reserve the employer's right to amend the plan, however, is not presented in this case. As we have noted, the Sixth Circuit concluded that there was *no* vesting language or promise of permanent benefits in any GM SPD. As a consequence, the issue raised by plaintiffs could not be resolved in this case even if the courts were in conflict on the point.

In fact, however, there is no conflict among the circuits: the courts agree that, where a plan has been unilaterally created by an employer, without collective bargaining, an unambiguous reservation of the right to amend generally must control.[7] The cases cited by plaintiffs (at Pet. 13) are not to the contrary. Two of those cases (*Diehl* v. *Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996), and *Stewart* v. *KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993)) involve the interpretation of collective bargaining agreements and therefore are inapposite.[8] Claims in such cases arise under the Labor-Management Relations Act as well as under ERISA (see *Diehl*, 102 F.2d at 305; *Stewart*, 980 F.2d at 702), and the courts—including, most prominently, the Sixth Cir-

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[7] See, *e.g.*, *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 904 & n.11 (3d Cir. 1995) (citing cases); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 938-939 (5th Cir. 1993).

[8] There can be no serious suggestion that the Seventh Circuit would disagree with the Sixth Circuit's disposition here since it has expressly followed the en banc decision in this case. See *Frahm* v. *Equitable Life Assurance Soc'y*, 137 F.3d 955, 956-961 (7th Cir. 1998) (rejecting claims of early retirees seeking "lifetime" medical benefits under contract, estoppel, and fiduciary duty principles). Moreover, *Diehl* is distinguishable because it did not involve a plan document that contained both lifetime benefits language and a reservation of the employer's right to amend the plan. Instead, *Diehl* involved two *separate* agreements that were negotiated years apart; the second agreement, which made the reference to vested benefits, superseded the earlier one, which reserved the employer's rights. See 102 F.3d at 307. The court thus expressly noted that its holding did not call into question the principle that, "when potentially conflicting provisions coexist within the same document, * * * [the] contractual provisions [should] be read as parts of an integrated whole," and reaffirmed that a reservation of rights "allows the employer to retroactively change the medical benefits of retired participants, even in the face of clear language promising company-paid lifetime benefits." *Ibid.*

cuit—have held that such claims are governed by special rules applicable to labor agreements that are relevant only "when attempting to discern the intent of the parties in the collective bargaining context." *Smith* v. *ABS Indus., Inc.*, 890 F.2d 841, 845 (6th Cir. 1989). See, *e.g.*, *Policy* v. *Powell Pressed Steel Co.*, 770 F.2d 609, 613-614 (6th Cir. 1985), quoting *UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983) (discussing presumptions "'when the parties contract for benefits'"); *id.* at 613 (applying a presumption that "weigh[s] in favor of finding that retiree benefits survive expiration of the collective bargaining agreement"); *Stewart*, 980 F.2d at 702 (noting "the principle that the parol evidence rule should not be rigidly applied to labor contracts"). Cases applying such rules have no bearing here.[9]

The remaining decision cited by plaintiffs, *Barker* v. *Ceridian Corp.*, 122 F.3d 628 (8th Cir. 1997), likewise does not create a conflict on how to reconcile unambiguous reservation-of-rights provisions with express promises of vested benefits. In *Barker*, the employer's reservation of rights was *itself* ambiguous, and actually suggested that the plaintiffs' benefits *were* vested. See *id.* at 635-636. That holding (which found that a disability plan was vested while a medical plan was not) has no application in this case, where the Sixth Circuit found that the plan "*unambiguously* reserved GM's right to amend or terminate the plan." Pet. App. 20a (emphasis added). Indeed, the decision in *Barker* (see 122 F.2d at 635-637) expressly reaffirmed the approach stated in *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994), where the Eighth Circuit "agree[d] that a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits." In the Eighth Circuit, as in the Sixth Circuit, the plaintiff's burden of proof of vesting is "not met by the employer's promise to provide welfare benefits 'until death of retiree' where

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[9] We argued below that cases involving collective bargaining agreements have no relevance in this setting. GM CA Op. Br. 15 n.7. As we also noted below, plaintiffs "effectively concede[d] this point, because they * * * made absolutely no response to our arguments" on the issue. GM CA Reply Br. 4 n.2. Because plaintiffs never attempted to convince the Sixth Circuit that collective bargaining decisions have any bearing here, they can hardly now argue that the holding below conflicts with such decisions.

the employer had expressly reserved the right to terminate or amend the plan." *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109-1110 (8th Cir. 1990). That is the rule applied by every circuit to address the issue.[10]

There is, in short, no conflict among the circuits on the vesting issue. The cases cited by plaintiffs involve factual situations far removed from this one. There is no reason to believe that any other court of appeals would differ from the Sixth Circuit on the *facts* presented here. No court has ever suggested that medical benefits are frozen and unchangeable where the employer has *unambiguously* reserved its statutory right to amend a unilaterally established medical plan in hundreds of thousands of formal plan documents and has regularly exercised that right, and where the evidence affirmatively shows the employer's unwavering intent to preserve that right. See *Spacek* v. *Maritime Ass'n*, 134 F.3d 283, 293-294 (5th Cir. 1998) (summarizing appellate case law) ("The strong weight of authority throughout the circuits indicates that, in the area of welfare benefits, which are not subject to ERISA's minimum vesting and accrual requirements, a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually, and thus become unalterable, after the employee retires").

2. Plaintiffs next contend (at Pet. 13-14) that the Sixth Circuit "decid[ed] that reservations [of the employer's amendment rights] in underlying plan documents 'trump' SPDs containing

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[10] *In re Unisys Corp. Retiree Med. Benefit Litig.*, 58 F.3d 896 (3d Cir. 1995), and *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996), cited at Pet. 13, do not state a contrary rule. In fact, *Unisys* expressly held that "[w]here * * * the reservation of rights is broad and unequivocal, it will prevail over a promise of lifetime benefits." 58 F.3d at 904 n.11. The *Chiles* court noted that "the weight of case authority supports the *Unisys* approach" but was able to reject a vesting claim without having to apply any "hard-and-fast" rule. 95 F.3d at 1512 & n.2. While plaintiffs (at Pet. 12) assert that *Barker* and *Chiles* have recognized confusion among the lower courts on this point, neither those decisions nor *any* other case arising outside of the collective bargaining context fails to give primacy to an *unambiguous* reservation-of-rights clause.

lifetime promises with no reservations," and that this purported holding conflicts with decisions of other courts. But this assertion rests on a plain misreading of the decision below. The Sixth Circuit most certainly did *not* hold that the underlying plan documents control when they are inconsistent with promises made in SPDs. Instead, as we have explained, the court began with the factual premise that GM's SPDs do not "stat[e] or even impl[y] that the plaintiffs' benefits were vested" (Pet. App. 22a-23a); on that factual basis, the court held that omission from some SPDs of a statement of GM's right to amend does not *itself* serve to vest benefits because "GM was not required to disclose in the summary plan descriptions that the plaintiffs' benefits were not vested." *Id.* at 22a. In the portion of the court's opinion that is misleadingly cited by plaintiffs (at Pet. 13), the Sixth Circuit explained that "GM's failure to include in some summaries *a notice of its right to change the plan* does not trump the clearly-stated right to do so in the plan itself." Pet. App. 21a (emphasis added).

That holding—that "[a]n *omission* from the summary plan description does not, by negative implication, alter the terms of the plan itself" (Pet. App. 21a (emphasis added))—states the rule in every circuit. The many cases cited by plaintiffs (at Pet. 14) are not to the contrary; they stand for the unexceptional proposition that the SPD controls when its statement of benefits *conflicts with* those in the underlying plan documents. Far from rejecting that rule, the court below expressly reaffirmed it, declaring that "'statements in a summary plan are binding and if such statements conflict with those in the plan itself, the summary shall govern.'" Pet. App. 19a, quoting *Edwards* v. *State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988). See *id.* at 21a ("the principle announced in *Edwards* does not apply to silence"). Beyond this, the cases cited in the petition consistently hold that retirees (such as plaintiffs) who have reasonable notice of underlying plan terms may not rely on an SPD to override those terms. *E.g.*, *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1518-1519 (10th Cir. 1996) (refusing to apply *Edwards* to create "windfall" recoveries where employees are on notice of true plan terms and cannot establish "reliance" and "prejudice" flowing from faulty plan descriptions). Plaintiffs' attempt to manufacture a conflict on this point therefore has no substance at all.

3. Third, plaintiffs take issue with the Sixth Circuit's passing statement that "the intent to vest 'must be found in the plan documents and must be stated in clear and express language,'" asserting that other courts allow rights to vest even when the plan is "ambiguous" on the subject of vesting. Pet. 14, quoting Pet. App. 19a. Again, the question whether ambiguous documents may give rise to vested rights simply is not presented here. The Sixth Circuit ruled that the GM plan is *not* ambiguous; it found that nothing in the plan documents or SPDs "even *implies* that the plaintiffs' benefits were vested" (Pet. App. 22a-23a (emphasis added)) and added that "the summary plan descriptions *un*ambiguously reserved GM's right to amend or terminate the plan." *Id.* at 20a (emphasis added). See *id.* at 26a-27a (estoppel claims rejected because plan and SPDs "unambiguously reserved to GM the right to amend or terminate the plan"). The Court therefore would have no occasion in this case to address the rules governing the construction of ambiguous plans.

In any event, plaintiffs' assertion of a conflict once again is insupportable. Most of the decisions that plaintiffs rely upon (at Pet. 15 & n.3) for the proposition that ambiguous plan documents may give rise to vested rights involve the interpretation of collective bargaining agreements; as we have explained, such cases involve special rules of construction that are inapposite here.[11] The

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[11] See *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603, 604 (7th Cir. 1993) (suit based "primarily on section 301 of the Taft-Hartley Act"; ERISA "has little bearing on the issues in contention"); *International Ass'n of Machinists & Aerospace Workers* v. *Masonite Corp.*, 122 F.3d 228, 231, 233 (5th Cir. 1997) (citation omitted) (noting that "the rules of contractual interpretation are still applied with 'flexibility * * * in the context of labor contracts'"; reservation-of-rights clause that would control outside of collective-bargaining situation "cannot vitiate contractually vested or bargained-for rights"); *Stewart*, 980 F.2d at 702 ("[f]ederal substantive law governs the interpretation and enforcement of contracts covered by § 301(a) of the LMRA"; "the parol evidence rule should not be rigidly applied to labor contracts"); *United Paperworkers Int'l Union* v. *Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990) ("provisions of a labor contract may be more readily expanded by implication than those of contracts memorializing other transactions"); *Bower* v. *Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984).

other opinions cited by plaintiffs apply interpretative rules that do not differ materially from the one alluded to by the Sixth Circuit in this case. While plaintiffs (at Pet. 15 n.3) cite *Alexander* v. *Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), for the proposition that ambiguous plans may give rise to vested benefits, the Third Circuit (in an opinion written by the same judge who authored *Alexander*) more recently explained that vested rights "must be found in the plan documents and stated in clear and express language"; "[t]he plan participant bears the burden of proving, by a preponderance of the evidence, that the employer intended the welfare benefits to be vested." *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 902 (3d Cir. 1995). Similarly, the court in *Barker* (cited at Pet. 15 n.3) reaffirmed that "any promise to provide vested benefits must be 'incorporated, in some fashion, into the formal written ERISA plan,'" and that "employees carry the burden of showing an agreement or other demonstration of employer intent to vest benefits." 122 F.3d at 633, 634. And the holding of *Schonholz* v. *Long Island Jewish Med. Ctr.*, 87 F.3d 72 (2d Cir. 1996), cited at Pet. 14-15, addresses only the unusual situation where there are *no* formal plan documents or SPDs that could contain unambiguous vesting language.[12]

4. Plaintiffs gain nothing from vague references (at Pet. 15) to their estoppel and breach-of-fiduciary-duty claims. The petition

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[12] *Schonholz* noted the holdings of other courts "requiring that the employer's decision to vest benefits be set forth clearly in the plan documents" or indicating that "benefits could be vested by ambiguous language *in a collective bargaining agreement*." 87 F.3d at 78 (emphasis added). The Second Circuit distinguished those cases because in *Schonholz* the employer "created no such formal documents." *Ibid.* Even so, the court held that the plaintiff was obligated to "point to written language capable of reasonably being interpreted as creating a promise on the part of [the employer] to vest her severance benefits." *Ibid.* The Sixth Circuit found no such language here. It is settled law in the Second Circuit, reaffirmed in *Schonholz*, that an employer may amend its plan if it makes unambiguous reservations in formal plan documents. See *Moore* v. *Metropolitan Ins. Co.*, 856 F.2d 488 (2d Cir. 1988) (rejecting claims for vested benefits, notwithstanding "lifetime" language, where the employer reserved the right to amend in most formal plan documents).

does not take issue with the Sixth Circuit's estoppel holding that, "[i]n the face of GM's clearly-stated right to amend * * * reliance on statements allegedly suggesting the contrary was not, and could not be, reasonable or justifiable, especially when GM never told the plaintiffs that their benefits were vested or fully paid-up." Pet. App. 27a. Plaintiffs likewise do not challenge the Sixth Circuit's statement that no court of appeals has "impos[ed] fiduciary liability for a failure to disclose information that is not required to be disclosed" (*id.* at 30a)—or its unexceptionable holding that "GM's accurate representations of its current program" cannot "reasonably be deemed misleading." *Id.* at 31a. These claims accordingly would fail even if plaintiffs' contractual vesting theory had merit.

In sum, plaintiffs wholly disregard what the Sixth Circuit actually held in this case. They have not pointed to any decision that found benefits to be vested on a record even remotely similar to the one here. The cases cited by plaintiffs are not only factually distinguishable; they have no factual resemblance at all—turning on unique collective bargaining histories, unrelated plan documents, discrepant contractual language and expressions of intent, and plans (such as informal severance plans or disability plans) that differ fundamentally from the GM plan at issue here. Plaintiffs have not even attempted to establish that any other court would rule for them when—as the Sixth Circuit found to be true in this case—the employer did not "stat[e] or even impl[y] that the plaintiffs' benefits were vested" (Pet. App. 22a-23a) and "unambiguously reserved [its] right to amend or terminate the plan." *Id.* at 20a. Review of the vesting question therefore is unwarranted.

IV. The Sixth Circuit's Case-Specific Holding That Plaintiffs Were Not Promised Individual Medical Plans Creates No Conflict With The Law Of Other Circuits.

Plaintiffs contend (Pet. 16-19) that the Sixth Circuit's decision is in conflict with decisions of other courts of appeals on the question whether informal "bilateral early retirement agreements for free lifetime health care [are] enforceable under ERISA." Pet. i. But that question was not decided below. As the Seventh Circuit has observed, the en banc court "did not deny" that "bilateral contracts about welfare benefits are possible." *Frahm* v. *Equitable Life*, 137 F.3d 955, 958 (7th Cir. 1998). Rather, it held that GM's various informal, and often oral, communications did not as a

matter of fact create the innumerable "side agreements" or "individual plans" alleged by plaintiffs. The Sixth Circuit's disposition of that factual issue is obviously not worthy of this Court's review.

The Sixth Circuit found that GM's general statements regarding company-subsidized health care were accurate descriptions of *current* plan terms, not "promises" of new and different plans. The court explained that the statements were "undeniably true under the terms of GM's then-existing plan" (Pet. App. 29a). The court added that, given GM's repeated and "clearly-stated" notification of the company's right to amend, it "could not be reasonable or justifiable" to view the descriptions as promises, "especially when GM never told the plaintiffs that their benefits were vested or fully paid-up" (*id.* at 27a); "[n]either the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." *Id.* at 22a-23a. The court also found that "[n]one of GM's representations suggested" either "that the plan was being modified" through letters of acceptance memorializing retirement or that copayments or deductibles would be frozen at any particular level. *Id.* at 24a. In these circumstances, there is no factual predicate for plaintiffs' assertion that GM's informal, brief, and obviously incomplete summaries of existing plan terms created separate vested plans or "side agreements" for medical benefits.[13] The legal question plaintiffs wish to debate simply is not presented by the factual record or the opinion below.

In addition, as a matter of law, plaintiffs could not rely on informal and incomplete communications to override or supersede the terms of formal plan documents, which were widely distributed and which unambiguously reserved GM's right to amend. As the Sixth Circuit explained, this Court's decisions make clear that ERISA "'has an elaborate scheme in place for beneficiaries to learn their rights and obligations at any time, a scheme that is built

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[13] The various "statements of acceptance" signed by some early retirees "have nothing whatever to say about the health care plan." As the court of appeals recognized, "the context suggests" that the "benefits" referred to in these statements are "only * * * pension benefits." Pet. App. 25a n.12.

around reliance on the face of written plan documents'" (Pet. App. 23a), including "Summary Plan Descriptions" distributed to employees and "governing plan documents" made "available for inspection." *Curtiss-Wright*, 514 U.S. at 83-84. ERISA's written instrument requirement ensures "that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." *Id.* at 83. Plan administrators would face an impossible task if "occasional corporate communications" could take the place of "'the documents and instruments governing the plan.'" *Id.* at 82.

Contrary to plaintiffs' assertion, there is no conflict among the circuits as to these governing legal principles. The courts of appeals consistently have held that the terms of a complex medical plan, set forth in formal plan documents, may not be amended or superseded by informal communications, particularly highly abbreviated statements (in this case, a few sentences or phrases) that obviously describe only limited aspects of the formal plan. See, *e.g.*, *Gable*, 35 F.3d at 857 ("the fact that [the] documents referred to retirees' benefits as 'lifetime benefits' does not nullify the company's right to modify, because the [documents] are informal communications that do not govern the company's obligations under an ERISA plan"); *Moore* v. *Metropolitan Life Ins. Co.*, 856 F.2d 488, 489, 492 (2d Cir. 1988) (written statements referring to "'lifetime' benefits 'at no cost'" did not create vested benefits because "Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans"); accord *In re Unisys Corp. Retiree Med. Benefit Litig.*, 58 F.3d 896, 902 (3d Cir. 1995); *Pierce* v. *Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 937-938 (5th Cir. 1993); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323 (5th Cir. 1994); *Pisciotta* v. *Teledyne Indus.*, 91 F.3d 1326, 1329, 1331 (9th Cir. 1996); *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996); *Peckham* v. *Gem State Mut.*, 964 F.2d 1043, 1050 n.13 (10th Cir. 1992); *Alday* v. *Container Corp.*, 906 F.2d 660, 665 (11th Cir. 1990); see also *Frahm*, 137 F.3d at 957-961 (explicitly following the Sixth Circuit's analysis in this case).

The cases that plaintiffs claim (Pet. 17) are in conflict with the Sixth Circuit's ruling are factually and legally inapposite.

Plaintiffs cite *Donovan* v. *Dillingham*, 688 F.2d 1367 (11th Cir. 1982), and its progeny for the proposition that an ERISA plan may sometimes be established without satisfying all ERISA-mandated formalities, provided that "the surrounding circumstances" enable "a reasonable person [to] ascertain the intended benefits" and other key terms. But informal statements that GM would provide retirees with "basic health care coverages" at GM's expense say nothing about the level of those coverages or their terms and conditions, and the written acceptances of early retirement say nothing at all about any medical care plan. As a matter of *fact*, these informal statements fail to satisfy the *Dillingham* requirement, as the Sixth Circuit recognized.

More fundamentally, the cases plaintiffs rely on recognize that an ERISA plan may be created informally where either there is *no* existing formal plan covering the same type of benefits (*Dillingham*, 688 F.2d at 1370; *Kenney* v. *Roland Parsons Contr. Corp.*, 28 F.3d 1254, 1258 (D.C. Cir. 1994); *Grimo* v. *Blue Cross/Blue Shield*, 34 F.3d 148, 150-152 (2d Cir. 1994); *Memorial Hosp.* v. *Northbrook Life Ins. Co.*, 904 F.2d 236, 240-241 (5th Cir. 1990); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-1504 (9th Cir. 1985)) or the informal plan extends the *same* coverage as an existing formal plan to a person who is not covered by that plan. *Miller* v. *Taylor Insulation*, 39 F.3d 755, 760 (7th Cir. 1994). None of those cases even suggests that informal representations may replace or "override the clear terms" of an existing formal plan that covers the same type of welfare benefits. Pet. App. 27a.

Indeed, far from having "rejected the *Dillingham* test" (Pet. 17), the Sixth Circuit has repeatedly applied it. *E.g.*, *Olejniczak* v. *Industrial Mach. & Die*, 106 F.3d 401 (Table), 1997 WL 14776, at *4 (6th Cir. 1997) ("This Circuit [has] adopted the *Dillingham* approach for determining whether an employer has established an employee benefit plan"); *Brown* v. *Ampco-Pittsburgh Corp.*, 876 F.2d 546, 551 (6th Cir. 1989). But on facts like those involved here, the "*Dillingham* approach" is simply inapplicable. Confirming this, the Eleventh Circuit has consistently held that informal written and oral statements cannot override formal plan documents—without discerning any tension between that rule and its

Dillingham decision. *Alday*, 906 F.2d at 665-666; *Nachwalter* v. *Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

Nor, as plaintiffs maintain (Pet. 18 & n.4), is there any inconsistency between the Sixth Circuit's ruling and cases recognizing "the enforceability of single-employee ERISA plans" in certain circumstances. *Cvelbar* v. *CBI*, 106 F.3d 1368 (7th Cir. 1997), gave effect to a written agreement that granted severance benefits in the event of termination. Far from overriding the terms of a formal group medical plan, the severance plan there at issue stated that the "terms and conditions of such coverage were contained in the First Peoria Corp. Retirement Plan." *Id.* at 1379. The court ultimately sustained the employer's decision to terminate benefits altogether. *Id.* at 1380. Similarly, *Williams* v. *Wright*, 927 F.2d 1540, 1542 n.3 (11th Cir. 1991), gave effect to a written agreement with a retiring employee to continue to pay his premiums "on the company's group medical insurance plan." And in *Hamilton* v. *Air Jamaica*, 945 F.2d 74, 77-79 (3d Cir. 1991), the court concluded that a severance pay plan was officially embodied in the "employee handbook" given to all employees. The court stressed that such a formal plan document could not be modified through informal communications and that the employer's reservation of the right to amend or terminate must be given full effect. *Ibid.* "Air Jamaica's employees are on notice that they have no guaranteed benefits." *Id.* at 78. "Employers are understandably more willing to provide employee benefits when they can reserve the right to decrease or eliminate those benefits." *Id.* at 79. In *Frahm*, the Seventh Circuit followed the Sixth Circuit's decision here, refusing to hold that "oral statements and letters" during discussions about retirement created "individual contracts * * * establishing rights on top of those created by [a formal] health benefits plan." 137 F.3d at 957-961.

In sum, not one of the cases that plaintiffs claim are in conflict with the Sixth Circuit's ruling even suggests that tens of thousands of employees are entitled to rely on their own personal interpretations of informal and obviously incomplete communications to override the explicit terms of a formal medical plan, or to splinter a complex medical plan into innumerable individual pieces. As the en banc court explained (Pet. App. 25a), acceptance of plaintiffs' unprecedented claim would subvert Congress's purpose

in passing ERISA. Congress recognized that impractical vesting requirements would cause employers to respond by "decreasing benefits under existing plans or slowing the rate of formation of new plans." This was the opposite of the "broader use" of employee welfare plans that Congress wished to achieve:

> [S]ince these plans are voluntary on the part of the employer * * * it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans.

H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 15 (1974); see note 3, *supra*. Because Congress intended employers to be "free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans" (*Curtiss-Wright*, 514 U.S. at 78), the en banc court correctly determined that GM's informal communications could not reasonably be understood to fragment the GM plan into a multitude of individual plans that were perpetually frozen and unamendable.[14]

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[14] Plaintiffs suggest in passing that GM did not properly embody its medical plan in formal plan documents. Pet. 14 n.2. The reason the Sixth Circuit did not review the district court's finding that GM adequately embodied its plan in formal documents is that plaintiffs deliberately *waived* this argument. See Pet. App. 10a n.4, 14a n.7, 96a. Plaintiffs' argument is in any event baseless. GM originally embodied its health care plan in insurance policies and insurance certificates (C.A. App. 1947-2024). When GM became self-insured, it embodied the plan in a lengthy formal document that was filed with the Internal Revenue Service. *Id.* at 1438-1692, 644, 700, 1418, 1936. That plan explained that it applied to "salaried employees" (*id.* at 1438), provided in detail how it would be funded and administered, and specified what benefits would be paid to employees and retirees. Additional details were repeated in the summary plan descriptions, including GM's right to "amend, modify, suspend, or terminate its benefit Plans or Programs by action of its Board of Directors." *Id.* at 1417, 1419, 1935, 1938, 2029-2034. These fact-bound issues, which are not mentioned in the questions presented in the petition, are plainly unworthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-1639

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ROBERT D. SPRAGUE, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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OCTOBER TERM, 1997

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Petitioners,

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GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1/]

The American Association of Retired Persons (AARP), a nonprofit membership organization of more than 30 million Americans age 50 or older, is dedicated to addressing the

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[1/] No counsel for any party authored any portion of this brief. No persons other than AARP, its members, or its counsel have made a monetary contribution to the preparation and submission of this brief. Some of the petitioners, including Mr. Sprague, are AARP members and pay AARP membership dues.

needs and interests of older workers and retirees. Approximately sixteen million AARP members are under age sixty-five, and generally not eligible for Medicare. Many of AARP's members, working and retired, are participants and beneficiaries in employer-sponsored benefit plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*[2/]

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens. In the effort to promote independence, AARP works to foster the health and economic security of individuals as they age by attempting to ensure the availability of quality and economical health coverage, from both public and private sources.

Health care coverage is essential to adequate medical care in this country. AARP members are greatly concerned that they have adequate health care coverage, especially in the event of hospitalization, long-term disability or catastrophic illness. Pre-existing medical conditions and exorbitant costs pose significant barriers to AARP members in obtaining such coverage.

When employer-provided retiree health coverage is eliminated or reduced, notwithstanding corporate representations to the contrary, it may be virtually impossible for a retiree to obtain comparable and affordable coverage elsewhere. Since a number of illnesses which require

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[2/] To ensure, to the greatest extent possible, the availability of health coverage under employer-sponsored benefit plans, AARP has participated as *amicus curiae* in numerous cases involving ERISA, including *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 117 S.Ct. 1513 (1997); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

extensive treatment occur more frequently in the older population, AARP members and others face significant risks when an employer breaches its promise of continued health benefits during retirement.

Because elimination or reduction of retiree health benefits has a direct bearing on the economic and health security of millions of Americans, including AARP members, AARP is vitally interested in ensuring that employer promises for lifetime health care benefits are enforceable under ERISA and, further, that bilateral contracts providing for enhanced benefits are enforceable.[3/]

REASONS FOR GRANTING THE WRIT

In addition to the substantial conflict between the circuits on the questions presented by petitioners, a writ of *certiorari* is appropriate because the Sixth Circuit decision upsets the status quo for both employers and employees by invalidating the business practice of offering ERISA-covered benefits as consideration for an employee's release of potential legal claims. When retiree health coverage is reduced or eliminated, employees' retirement security is thrown into jeopardy due to the high cost of replacement health coverage -- if it can be obtained at all.

[3/] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

I. THE SIXTH CIRCUIT DECISION UPSETS THE STATUS QUO FOR BOTH EMPLOYERS AND EMPLOYEES BY INVALIDATING THE BUSINESS PRACTICE OF OFFERING ERISA-COVERED BENEFITS AS CONSIDERATION FOR AN EMPLOYEE'S RELEASE OF POTENTIAL LEGAL CLAIMS.

The Sixth Circuit held that the bilateral contracts providing enhanced ERISA benefits to 50,000 early retirees are not enforceable. This holding wreaks havoc with the current business practice of using enhanced ERISA benefits as consideration for an employee's release of potential legal claims. Indeed, General Motors' Vice President of Corporate Personnel, Richard O'Brien, considered early retirement incentives "a 'win-win' situation 'for the corporation and the employee.'" (Appx. at 186a).

Because employees will not agree to waive their legal rights for petty consideration, employers which are unable, or unwilling, to pay significant amounts out of their general assets will be unable to obtain releases from employees. *See generally Lockheed Corp. v. Spink*, 517 U.S. 882 (1996). Moreover, employees will not gain the advantages of the receipt of these enhanced benefits. Accordingly, this decision upsets the status quo for both employers and employees and undermines the effectiveness of workforce reduction programs.

During the past decade and a half, employers (including GM) have frequently relied on early retirement incentive programs as a means of reducing their workforce size. Since 1986 numerous groups have surveyed businesses to determine

the frequency of the use of such programs.[4/] These early retirement incentive programs may include a variety of incentives such as additional or enhanced pension benefits, retiree health insurance, lump sum cash payouts and Social Security "bridges," in which the employer fills the gap between the date that the employee ceases to receive pay checks and the date of the employee's Social Security and Medicare eligibility. Shalowitz, *supra*, at 3; Paul Fronstin, Employee Benefit Research Inst., *Employee Benefits, Retirement Patterns, and Implications for Increased Work Life*, at 7 (EBRI ISSUE BRIEF NO. 184, Apr. 1997) ("continued insurance benefits may be offered to retire early").

Indeed, not only have businesses used early retirement incentive programs to reduce the workforce, but they have

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[4/] Charles D. Spencer, SPENCER'S RESEARCH REPORTS § 111.02-1 (July 1987) (24% of 189 corporations offered early retirement incentives); Hewitt Assocs., PLAN DESIGN AND EXPERIENCE IN EARLY RETIREMENT WINDOWS AND IN OTHER VOLUNTARY SEPARATION PLANS 1 (1986) (one-third of more than 500 corporations used exit incentive programs in the past 5 years); Charles Betley, Employee Benefit Research Inst., *Trends and Issues in Early Retirement* (EBRI ISSUE BRIEF NO. 103, June 1990) (66% of 145 companies contacted offered early retirement incentives during the previous 6 years); Seymour LaRock, *Both Private and Public Sector Employers Use Early Retirement Sweeteners*, EMPLOYEE BENEFIT PLAN REV., Aug. 1992 at 14 (13.2% of 362 employers offered early retirement incentives in 1991; one-third that had not offered such an incentive had made offer in the preceding 10 years); Deborah Shalowitz, *As Recession Drags On, Employers Take a Shine to Window Plan Options*, BUSINESS INSURANCE, Sept. 7, 1992, at 3-4 (38% of 50 large companies offered an early retirement incentive in 1990 or 1991); Fran Hawthorne, *Rigging the Early Retirement Game*, INSTITUTIONAL INVESTOR, May 1, 1993, at 79-80 (40% of 400 companies offered early retirement incentives); Seymour LaRock, *Early Retirement Incentives in 1995: More Takers for Fewer Offers*, EMPLOYEE BENEFIT PLAN REV., Sept. 1996, at 54 (10.8% of mid-size to large private sector employers made early retirement offers).

been forthright about their need for finality and thus their need for the enforceability of bilateral contracts. In their *amici curiae* brief before this Court in *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998), three business groups -- the Equal Employment Advisory Council, Chamber of Commerce and Edison Electric Institute[5/] -- recognized the importance of bilateral contracts in the form of a promise of retiree health insurance or other enhanced benefits in consideration for the employee's execution of a release of potential legal claims.

> When implementing workforce reductions, many employers offer special, added benefits to departing employees who agree to release legal claims they might otherwise assert against the employer. Individuals who voluntarily accept this option by signing general releases receive enhanced severance benefits -- *e.g.*, supplemental cash payments, extended health care coverage, additional pension benefits, and the like -- over and beyond any benefits the employer has committed to provide upon termination of their employment. In return, the employer gains relief from the lingering uncertainties and potential liabilities it otherwise would face until expiration of the filing dates for all possible claims relating to the individual's employment. Because of the significant, mutual advantages they afford to both employee and employers, such release-for-consideration agreements are used widely in implementing workforce reduction programs throughout the United States.

[5/] In their Statement of Interest, these three groups state that they represent over three million business entities.

BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF RESPONDENT in *Oubre v. Entergy Operations, Inc.* at 2-3.

Thus, business recognizes the importance of the enforceability of releases and the security they bring. Even General Motors itself has argued, successfully, that early retirement releases are enforceable because they are binding bilateral contracts -- precisely the opposite of the position that it took in this case. *See White v. General Motors Corp.*, 908 F.2d 669 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); *Seward v. B.O.C. Div. of General Motors Corp.*, 805 F.Supp. 623 (N.D. Ill. 1992).

The Sixth Circuit decision completely dismantles the common business practice of using enhanced ERISA benefits as consideration for an employee's release of potential legal claims -- a practice that Congress and this Court have sanctioned.[6/] Employers lose protection from lawsuits, and employees lose the guarantee of lifetime health benefits.

II. RETIREES' SECURITY WILL BE SHATTERED IF EMPLOYERS ARE PERMITTED TO BREACH THEIR PROMISES TO PROVIDE RETIREE HEALTH BENEFITS.

Just like employers, employees also want the certainty of knowing that the agreement that they signed promising retiree health benefits will be enforceable. Losing access to

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[6/] Older Workers Benefit Protection Act (OWBPA), Pub. L. 101-433, 104 Stat. 978 (1990); *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

employer-promised health coverage after giving up their jobs and current benefits in exchange for that coverage will shatter many employees' retirement security.

A. Employer-sponsored Health Insurance Entices Employees to Give Up Their Jobs and Current Benefits.

Retiree health insurance is one of the most popular "carrots" employers dangle to entice employees to leave the workforce early. Many employers find that employees will not accept an early retirement incentive unless enhanced medical benefits are provided. Some benefit consultants maintain that without retiree health coverage an early retirement incentive plan will not be successful. Deborah Shalowitz, *As Recession Drags On, Employers Take a Shine to Window Plan Options*, BUSINESS INSURANCE, Sept. 7, 1992, at 3, 6. Quite simply, these consultants recognize that medical premiums are too expensive for individual employees to pay, especially if they are not yet eligible for Medicare, making them valuable enough to entice employees to give up their jobs and current benefits for the employer's promise. *Hang Tough, or Take the Gold Watch Early?*, FORBES, May 5, 1986, at 158.[7]

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[7] The use of extended health coverage in early retirement incentives has been consistently used to "sweeten" the retirement package. Seymour LaRock, *Early Retirement Incentives In 1995: More Takers For Fewer Offers*, EMPLOYEE BENEFIT PLAN REV., Sept. 1996 at 54, 56 (at least 40 companies provided some type of extended group health coverage to early retirees, with 20 companies providing coverage for the life of the employee and 13 providing coverage until the employee became eligible for Medicare); Seymour LaRock, *Both Private and Public Sector Employers Use Early Retirement Sweeteners*, EMPLOYEE BENEFIT PLAN REV., Aug. 1992 at 14, 19 (41 out of 50 employers provided some type of extended group health coverage to early retirees with 26 of 41 provided coverage for the life of the employee).

Numerous studies, employing a variety of research methodologies, confirm that employees who have, or believe they have, retiree health coverage are more likely to retire before age 65 than are employees who do not expect such coverage. *See* U.S. General Accounting Office, RETIREE HEALTH INSURANCE: EROSION IN EMPLOYER-BASED HEALTH BENEFITS FOR EARLY RETIREES 8 (GAO/HEHS-97-150, July 1997); Fronstin, *supra*, at 8-9 (after analysis of five studies, concluded that "individual retirement decisions are strongly responsive to the availability of retiree health insurance"); *accord,* Joseph F. Quinn & Richard V. Burkhauser, RETIREMENT PREFERENCES AND PLANS OF OLDER AMERICAN WORKERS 17, 18 (1990) (employees with continued coverage are more likely to retire before age sixty-five). Indeed, there is no evidence to suggest otherwise.

Not surprisingly, employees themselves view the provision of retiree health benefits as important in the decision to give up their jobs and accept early retirement incentives. This is especially true for lower to middle income employees. In response to the Gallup Poll question -- would you retire before you become eligible for Medicare if your employer did not provide health benefits for retirees? -- only 35% of nonretired respondents answered yes, and as expected, the lower the employee's income, the more likely he or she was to answer negatively. Employee Benefit Research Inst., PUBLIC ATTITUDES ON MEDICARE & RETIREE HEALTH, at 16 (1993).[8]

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[8] *Accord*, Quinn & Burkhauser, *supra*, at 17, 18 (concluding that "[p]eople's behavior depends on the financial conditions they face"); University of Rochester and Regional Council on Aging, CONSEQUENCES OF EARLY RETIREMENT WITH INCENTIVE PROGRAMS: A REPORT FOR AARP'S PUBLIC POLICY INSTITUTE (1989) (finding that continuation of health benefits was major factor in an employee's retirement decision).

Clearly, employer-sponsored retiree health benefits are very important -- and frequently determinative -- in an employee's decision to give up his or her job and current benefits and accept an early retirement incentive.

B. When Employers Break Their Promises, Retirees Are Faced with Higher Insurance Premiums and an Inability to Obtain Health Care Coverage, Leaving Them Vulnerable to High Medical Costs.

Because eligibility for Medicare does not generally begin until age sixty-five and older Americans tend to consume more medical services, thus making their health care costs more expensive, lost access to employer-promised health care coverage results in major problems for retirees and their dependents. These problems are (1) higher costs in purchasing any health care coverage on their own; (2) less comprehensive, or no, coverage, due to higher costs; and (3) inability to obtain non-restricted health care coverage due to pre-existing conditions. *See generally* U.S. Government Accounting Office, *supra*, at 1, 2; Fronstin, *supra*, at 5, 8-9.

The retired employees and their dependents may struggle to pay for health care, even if they are fortunate enough to find an insurance company which will cover them. For example, an individual who had been promised retiree health benefits from Pabst Brewing Company would have had to pay $8200 annually in the individual insurance market to replace these benefits.[2/] U.S. General Accounting Office, *supra*, at 1, 3. Even those retirees with Medicare coverage rely on

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[2/] In 1995, the median annual income from a private pension annuity for men, age 65-67, was $8,580. Employee Benefit Research Inst., EBRI DATABOOK ON EMPLOYEE BENEFITS, *Retirement Annuity and/or Employment Based Pension Income Recipiency*, at 65, tbl. 8.1 (4th ed. 1997).

employer-promised benefits to fill the gaps in Medicare coverage, such as deductibles and co-payments. *Id.*

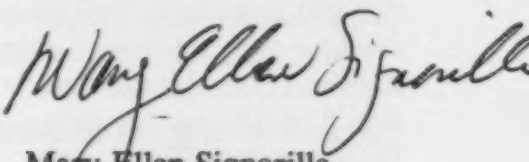
Especially hard hit are those retirees who need medical insurance the most -- those with pre-existing medical conditions. These retirees will most likely find that they cannot obtain coverage, leaving them vulnerable to costly medical expenses, and possibly wiping out their personal savings and sending them into poverty. John Mintz & Kathleen Day, *Health Care's Painful Changes: More Retirees Are Left in the Lurch as Firms Slash Health Coverage*, WASHINGTON POST, Feb. 28, 1993, at H1; Albert B. Crenshaw, *Fewer People Opt for Early Retirement; Pension Shifts, Economic Worries Are Key Factors*, WASHINGTON POST, June 13, 1993, at H3.

Even if these retirees can obtain health coverage, this coverage may permanently exclude an existing health problem, which typically is the primary reason that retirees and their families need the health coverage. Moreover, the cost to cover the pre-existing condition may be prohibitive. Health insurance carriers have declined coverage for individuals with diabetes; excluded coverage for asthma, ulcers and glaucoma; and charged higher premiums for plans that covered problems like anemia and arteriosclerosis. *See generally* U.S. General Accounting Office, *supra*, at 13.

CONCLUSION

AARP supports Petitioner's writ of *certiorari* to the Sixth Circuit and respectfully urges the Court to grant review of this case.

Respectfully submitted,



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October Term, 1997

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BRIEF OF *AMICI CURIAE* DONALD ARMBRUSTER, *ET AL.* AND THE REPUBLIC STEEL SALARIED RETIREES ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici Donald Armbruster, et al., are long-service former employees of a major industrial employer who are now litigants seeking relief for reduction and denial of medical benefits their employer represented would cover them after retirement for their and their spouses' lifetimes.[2] *Amici* Armbruster, et al., are representative of tens of thousands of retired employees in this country who have suffered reductions in retiree benefits after they retired, despite having been led by their employers to believe that the benefits for which they labored were secure. The problem they confront is not unique to retiree medical benefits, but relates to all benefits that are not governed by ERISA's bright line vesting rules. In addition, *amici* Armbruster, et al. have a special perspective on benefits practices and protections before and after enactment of ERISA due to the fact that several of them personally served as benefits executives and other company managers who were responsible for explaining retiree medical benefits to employees in their companies. In this capacity, they were fully informed about employer intentions, employee understandings of the benefits,

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1. Pursuant to Supreme Court Rule 37.6, *amici curiae* and their counsel disclose that no counsel for a party authored the brief in whole or in part, and that no person or entity, other than *amici*, their members or their counsel, have made a monetary contribution to the preparation or submission of the brief.

2. *Amici* Donald Armbruster, John Gustke, Robert Rawlings, William Varney, Robert Butler, and Maynard Brandt are individual named plaintiffs and proposed representatives of a class of former salaried employees of Fruehauf Corporation. *Armbruster, et al. v. K-H Corporation*, No. 97-CV- 75792 (E.D. Mich.). In a predecessor action, *amici* Armbruster, et al. were certified as representatives of a class seeking relief for benefits reductions and fiduciary misrepresentations. *See Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588 (E.D. Mich. 1996).

and the expected legal protections that would apply to these benefits should any dispute arise about them.

Amicus Republic Steel Salaried Retirees Association ("RSSRA") is a not-for-profit Ohio corporation composed of retired salaried employees of Republic Steel. The purpose of RSSRA is to protect the rights and interests of the Republic Steel retired salaried employees, particularly their rights and interests in insurance and pension benefits. RSSRA was involved in the dispute, and the resolution thereof, caused by LTV's reduction of health and life insurance benefits to its retirees and has a continued interest in judicial decisions and legislation related to post-retirement employer reductions of health, life and other welfare benefits.

As the experiences of *amici* demonstrate, the decision of the Sixth Circuit Court of Appeals in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (*en banc*), severely impairs the rights of retired employees to valuable benefits promised to them by their employers, both before and at the time of their retirements. The *Sprague* decision effectively holds that misleading benefits promises that induce reasonable reliance by employees are not binding on employers, and that employers may invoke disclaimers that they did not clearly disclose to the employees. The decision thus contravenes the fundamental protective purposes of ERISA.[3]

INTRODUCTION

Amici wish to bring to the Court's attention the stark contrast between the legal protections that were available to employees and retirees before enactment of ERISA and the severely diminished protections that now would apply under

3. The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

the decision below and other similarly-reasoned decisions. *Amici* respectfully urge that the decision below is contrary to ERISA's fundamental purpose of strengthening the legal protections available to employees and retirees to secure reasonably expected benefits and deterring abusive practices by employers that frustrate this statutory objective. As the Court has declared previously, courts should avoid interpretations of ERISA that afford less protection to employees and retirees than would have applied under the state law principles applicable before ERISA's enactment. Yet the decision below follows the opposite approach — replacing well-developed pre-ERISA state law protections with a regime under which reasonable benefits expectations can be frustrated and negated by hidden disclaimers and misleading representations. This reversal of position has occurred despite the repeated emphasis by the Congress and this Court to adhere to ERISA's fundamental protective purposes.

The ERISA statute has far-reaching affects on the daily lives of virtually every working man and woman in this country. The *Sprague* decision presents an exceptional opportunity for the Court to instruct and resolve the analytic disarray in the lower courts. *Amici* therefore strongly urge that the Court grant the Petition for Writ of Certiorari so that these matters of fundamental importance to employees, retirees, and employers can be definitively addressed.

REASONS FOR GRANTING THE WRIT

I.

REVIEW OF THE DECISION BELOW IS NECESSARY TO RESOLVE INTER-CIRCUIT CONFLICTS AND RESTORE ADHERENCE TO THE FUNDAMENTAL PROTECTIVE PURPOSES OF ERISA.

The Petition for Writ of Certiorari demonstrates the inter-circuit conflicts and analytic disarray that prevails in the lower courts. The analytic disarray in the lower courts is in part the result of the relative infrequency with which this Court has had an opportunity to address application of the substantive protections of ERISA.

The Court has repeatedly emphasized ERISA's fundamental protective purposes. ERISA imposes "strict standards" on benefits plan administrators and other fiduciaries. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-72 & n.10 (1985). These standards were enacted "[t]o help fulfill ERISA's broadly protective purposes," which include safeguarding "the continuing well-being and security of millions of employees and their dependents." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 & n.5 (1993), *quoting* 29 U.S.C. § 1001(a). The Congress "repeatedly emphasized [the] purpose to protect contractually defined benefits." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). ERISA therefore includes "safeguards to prevent abuse and 'to completely secure the rights and expectations brought into being by this landmark legislation.' " *Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133, 137 (1990) (quoting legislative history).

Consistent with the fundamental protective purposes of ERISA, the Court also has made clear that ERISA should be interpreted and applied to avoid results that "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989). As explained in the legislative history, the courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 101, 110 (1989); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 at n.26 (1983). In *Varity Corporation v. Howe*, 516 U.S. 489, 513 (1996), the Court again referred to the congressional statement of purpose and declared, "ERISA's basic purposes favor a reading of the third subsection [ERISA Section 502(a)(3)] that provides the plaintiffs with a remedy."

The decision below, and those others for which it stands as a vivid exemplar, contravene the Court's directives to adhere to the statute's fundamental protective purpose — safeguarding the benefits entitlements and income security of employees and retirees who have given years of service to their employers. As interpreted and applied in the court below, ERISA no longer preserves the level of protections that prevailed under pre-ERISA state law. Rather, ERISA has supplanted these state law protections with a regime under which long-promised retirement benefits can be evaded by means of sharp practices such as secret disclaimers and misleading drafting.

There is no doubt that the employer conduct at issue in this case would not have been permitted under the state law protections that prevailed at the time of ERISA's enactment. *Firestone* instructs that claims for promised benefits should be reviewed by a court "as it would have reviewed any other contract claim — by looking to the terms of the plan and other manifestations of the parties' intent." 489 U.S. at 112-13.

Whether analyzed pursuant to traditional contract principles, the doctrine of promissory estoppel, or the strict trust law fiduciary duties applicable to employers, courts applying pre-ERISA law would have enforced the right to the medical benefits General Motors promised to garner the loyal service of its employees and encourage their early retirement.

Many of these federal and state decisions applying pre-ERISA law relied on principles of consideration and contract. *See, e.g., Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 5-6 (1st Cir. 1978) ("even though the employer has reserved the right to amend or terminate the plan, once an employee, who accepted employment under such a plan, had complied with all the conditions entitling him to participate in such a plan, his rights become vested and the employer cannot divest the employee of his rights thereunder"); *Law Enforcement Labor Services, Inc. v. County of Mower*, 483 N.W. 2d 696, 701 (Minn. 1992) (retired beneficiaries' right to paid health care premiums for life "cannot be altered absent the retiree's express consent"); *Panto v. Moore Business Forms, Inc.*, 130 N.H. 730, 547 A.2d 260 (N.H. 1988) (promise of continuance of benefits for a period of time after being laid-off constituted unilateral contract, enforceable after employee completes service); *Blackwell v. International Union*, 9 Ohio App. 3d 179, 181-82, 458 N.E. 2d 1272, 1275-76 (Ohio Ct. App. 1983) (where employee repeatedly reassured of right to pension, offer of pension cannot be withdrawn after many years of employment); *Dulany Foods, Inc. v. C.M. Ayers*, 220 Va. 502, 512, 260 S.E. 2d 196, 202 (Va. 1979) (offer of severance pay plan not a gratuity, but "a unilateral contract offer which is accepted if the employee continues in the employment"); *Hart v. United Brotherhood of Carpenters & Joiners of America Local 626*, 352 A.2d 423, 426 (Del. Super. 1976) (promised pension benefits are "consideration for continued employee service and loyalty;" plan language to be construed in employee's favor); *Rose City*

Transit Co. v. City of Portland, 271 Ore. 588, 593, 533 P.2d 339, 342 (Ore. 1975) (pension or disability plan is offer which may be accepted by employee's continued employment, which "constitutes the underlying consideration for the promise"); *Ehrle v. Bank Bldg. & Equip. Corp. of America*, 530 S.W. 2d 482, 491-92 (Mo. App. 1975) (program of disability benefits became enforceable contract when employees acted in reliance thereon); *Frank v. Day's, Inc.*, 13 Wash. App. 401, 405, 535 P.2d 479, 482 (Wash. App. 1975) (a vested employee cannot have his pension benefits "altered to his detriment without corresponding benefit to him"); *Stopford v. Boonton Molding Co., Inc.*, 56 N.J. 169, 184, 265 A.2d 657, 664 (N.J. 1970) (employee's satisfaction of requirements for retirement benefits "constituted adequate consideration and brought about a vesting of the right to the lifetime benefits as prescribed by the plan"); *Sheehy v. Seilon, Inc.*, 10 Ohio St. 2d 242, 243, 227 N.E. 2d 229, 230 (Ohio 1967) ("through the inducements and actions of the employer these employees, upon retirement, acquired a vested right" to promised medical benefits); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 409, 171 N.E. 2d 518, 521 (Ohio 1960) (retirement plans "will give rise to contractual rights enforceable by the employee who has complied with all the conditions of the plan;" "[a] retirement program has become a basic part of an employee's remuneration . . . and a consideration flows to the employer"); *Bird v. Connecticut Power Co.*, 144 Conn. 456, 463, 133 A.2d 894, 897 (Conn. 1957) ("the employer may not defeat the employees' reasonable expectations of receiving the promised reward"); *West v. Hunt Foods, Inc.*, 101 Cal. App. 2d 597, 603, 225 P.2d 978, 982 (Cal. App. 1951) (employee who continues employment with knowledge of plan offered by employer may enforce right to a pension).

Other decisions rested on the doctrine of promissory estoppel. *See, e.g., Vastoler v. American Can Co.*, 700 F.2d 916, 918 (3d Cir. 1983) (promise to include past service in

pension benefit when asked to transfer from hourly to supervisory position enforced under principle of promissory estoppel); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1353-55 (8th Cir. 1980) (ambiguity in pension plan construed against employer-drafter; principle of promissory estoppel required employer's promise of pension benefits to be enforced); *In re Matter of Erie Lackawanna Railway*, 548 F.2d 621, 627 (6th Cir. 1977) ("Clearly, under our economic system, an employer cannot offer a retirement system as an inducement to employment and, after an employee has accepted employment under such circumstances, withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder"); *Hurd v. Hutnik*, 419 F. Supp. 630, 637 (D. N.J. 1976) ("where employers have given other assurances of a lifetime pension and employees elect to retire in reliance thereon, the doctrine of promissory estoppel bars such a later termination of the fund"); *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W. 2d 740, 749 (Minn. 1983) (under doctrine of promissory estoppel, after employee met original service requirement, promise of pension benefits cannot be amended to delay benefits until beneficiary reaches a prescribed age); *Feinberg v. The Pfeiffer Co.*, 322 S.W. 2d 163, 168-69 (Mo. App. 1959) (although promise of pension benefits did not consist of contractual obligation and plaintiff admitted that she would have continued to work regardless of promise of pension benefits, court, citing Section 90 Rest. of Contracts, illus. 2, found that retirement based on reliance of promise of pension precluded employer from later rescinding offer).[4]

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4. The conclusion that an employee or retiree has an enforceable contractual right to promised benefits inducing action or forbearance was so unexceptionable under pre-ERISA law that the *Restatement (Second) of Contracts* set forth this Illustration:

(Cont'd)

Still other decisions invoked the law of trusts and fiduciaries to require full and accurate disclosure of benefits information and to preclude employer invocation of undisclosed terms. *See, e.g., Carlsen v. Masters, Mates & Pilots Pension Plan Trust*, 80 N.J. 334, 341, 403 A.2d 880, 884 (N.J. 1979) (adverse disqualifying rule "should have been disclosed explicitly and unmistakably"); *Erion v. Timken Co.*, 52 Ohio App. 2d 123, 132, 368 N.E. 2d 312, 317 (Ohio App. 1976) (employer had fiduciary duty to bring pertinent points about benefits to

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(Cont'd)

> A has been employed by B for 40 years. B promises to pay A a pension of $200 per month when A retires. A retires and forbears to work elsewhere for several years while B pays the pension. B's promise is binding.

Restatement (Second) of Contracts, § 90, cmt. b, illus. 4 (1979). According to the Reporter's Note, the illustration is based on *Feinberg v. Pfeiffer Co.*, 322 S.W. 2d 163 (Mo. App. 1959).

Even without resort to the doctrine of promissory estoppel, familiar contract principles governing "manifestations of the parties' intent", *Firestone*, likewise would direct enforcement of the promise to pay medical benefits. Where the parties have attached different meanings to a promise,

> it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (b) that party [the employee] had no reason to know of any different meaning attached by the other [the employer], and the other had reason to know the meaning attached by the first party.

Restatement (Second) of Contracts, § 201(2)(b) ("Whose Meaning Prevails") (1979); *see also Corbin on Contracts*, 1951, § 538 at 61. This is "hornbook contract law." *United States v. Stuart*, 489 U.S. 353, 367 at n.7 (1989) (quoting same section of Restatement).

attention of employees, even if no specific questions posed by employees); *Moch v. Durkin*, 31 A.D. 2d 995, 297 N.Y.S. 2d 865, 867 (N.Y. App. 1969) (plan fiduciaries had "affirmative duty" to notify employees about plan procedures); *Branch v. White*, 99 N.J. Super. 295, 307, 239 A.2d 665, 671 (N.J. Super. 1968) (plan fiduciaries "under a duty to fully inform the beneficiaries of the trust of all facts relating to the subject matter of the trust which were essential for the protection of the beneficiaries' interests"); *Davilla v. Court Employment Project, Inc.*, 86 Misc. 2d 552, 555-56, 383 N.Y.S. 2d 140, 142 (N.Y. Kings County 1976) (employer may not avoid liability for benefits on "theory that plaintiff is bound by something he has no notice of and which is more restrictive than the notice actually given him").

Finally, courts adopted rules of construction mandating that benefits promises be construed most strongly in favor of employees. *See, e.g., Paddock Pool Co. v. Monseur*, 23 Ariz. App. 451, 453, 533 P.2d 1188, 1190 (Ariz. App. 1975); *Anger v. Bender*, 31 Ill. App. 3d 877, 880, 335 N.E. 2d 122, 125 (Ill. App. 1975); *Elby v. Livernois Engrg. Co.*, 37 Mich. App. 252, 253, 194 N.W. 2d 429, 430 (Mich. App. 1971); *Frietzsche v. First Western Bank & Trust Co.*, 168 Cal. App. 2d 705, 707, 336 P.2d 589, 590 (Cal. App. 1959); *Forrish v. Kennedy*, 377 Pa. 370, 376, 105 A.2d 67, 70 (Pa. 1954); *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 320, 264 N.W. 385, 386 (Mich. 1936) (death benefit plan's ambiguities are to be construed against employer; provision in plan allowing employer to change benefits not applicable to employees or their dependents who are receiving benefits).

Commentators have also noted that there was a well-developed body of protective state law in existence at the time of ERISA's enactment. *See* C. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common*

Law of Employee Benefits, 56 Ohio St. L. J. 153, 230-34 (1995); G. Flint, *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 Ariz. L. Rev. 611, 649-56 (1994); W. Payne, *Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiffs' Perspective*, 10 The Labor Lawyer 91, 93-97 (1994).

The Court has repeatedly noted the general guiding principles of ERISA interpretation and enforcement, including the charge to be at least as protective as the pre-ERISA protections discussed above. But what is the actual status of enforcement of ERISA's "broadly protective purposes" in this, its 25th year? Under the *Sprague* decision, courts will provide no remedy to employees who gave years of service to their employer and retired in reliance on promises of valuable medical benefits that they reasonably expected to be secure. Under the lower court's application of ERISA, fundamental benefits rights can be frustrated by hidden disclaimers in documents never disclosed to employees, and benefits can be misrepresented in order to retain and later retire thousands of employees. Although this type of conduct would "create[ ] liability even among strangers," *Varity*, 516 U.S. at 506, and General Motors would not tolerate it in its own commercial dealings, the lower court's misapplication of ERISA permits the company to escape its ERISA fiduciary and contractual responsibilities and creates a safe harbor for this conduct. Under pre-ERISA law, this outcome would be inconceivable. It is not the result intended by ERISA.

CONCLUSION

Without intervention by the Court, the decision in *Sprague* will be heralded and followed in the lower courts as authorizing a decisional approach that is contrary to ERISA's remedial goals. For the foregoing reasons, *amici curiae* support and respectfully urge the Court to grant the petition for certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT D. SPRAGUE, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Statutes and Regulations

Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1022 5
29 U.S.C. § 1024 5

Respondent has filed an unseemly opposition in this extraordinary case concerning the vesting of ERISA welfare benefits in retirement. In a bold assault on this Court's rule that oppositions be stated briefly and plainly, respondents have swamped the Court with a prolix brief that exceeds the 7⅛ inch text field limitation and crams 20-line arguments into footnotes. Respondent misleads the Court with highly argumentative misstatements of fact, endless snippets of out-of-context quoted material, and repetitious conclusory mantras, adding a dose of invective as well.[1] It obfuscates matters in the hope that the Court will accept the conclusion that the case lacks "certworthiness" because it is "fact-bound," an unhelpful jargonistic description repeated at least six times in respondent's brief.[2] We respectfully urge the Court to cut through the bombast in the opposition and grant review on the important legal issues presented.

The two ERISA issues presented are not at all bound up in factual peculiarities that would lessen the application of a decision in this case to all future cases involving vesting of ERISA welfare benefits. Here each of the ERISA summary plan descriptions ("SPDs") explicitly promised that basic health care would be provided for life at GM's expense. Approximately 45,000 of the 84,000 salaried retirees retired between 1974 and 1985 under those SPDs containing no statement of a reservation of the right to change the plan, and those retiring after mid-1985 retired under an SPD containing a reservation of rights statement. The first issue turns on whether the express promise of lifetime health care without a reservation is itself sufficient to vest benefits, and whether the

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[1] "Invective directed at the opponent and epithets characterizing the arguments as frivolous are largely wasted. I think it is also a signal to the judges that you are in trouble. So I think it is counterproductive." Interview, *Litigation* (Winter 1997) at 24. Here respondent hurls "frivolous," and adds "fantasy" and "extravagant" for good measure.

[2] What is "fact-bound"? Article III of the Constitution requires all legal pronouncements to be "bound" to facts to one degree or another, and does not allow advisory opinions on purely legal issues.

matter is ambiguous in the presence of both types of statements. The rift in the courts of appeals is not over labels to be placed on these facts, but over the legal standards for vesting.

Similarly, the second ERISA issue concerning the early retirement agreements, though presented against the backdrop of a lengthy trial and detailed factual findings that respondent did not appeal, turns solely on the law. The Sixth Circuit held that the bilateral written contracts for early retirement benefits are not enforceable under ERISA because they did not meet the "written instrument" requirements for ERISA plans. Whether employees and employers can contract for benefits under ERISA apart from the regular plan and without all the trappings of a complete ERISA plan document is an important question that affects millions of ERISA participants and their employers who enter into benefit agreements of all levels of formality.[3]

I. MISSTATEMENTS IN THE OPPOSITION SHOULD NOT DETER GRANT OF THE PETITION.

Space does not permit us to respond to all of respondent's misstatements, and undeniably that suits its strategy. We respond in three key areas.[4]

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[3] Respondent italicizes its argument that the petition should be denied because the Sixth Circuit did not express disagreement with decisions from other courts (Opp. 10, 15). The fact that the Sixth Circuit chose not to acknowledge conflicts does nothing to diminish these conflicts. If anything, the Sixth Circuit's approach compels even closer scrutiny to appreciate the wide swath cut through ERISA precedents by the lower court's decision.

[4] A fourth area of misrepresentation, though irrelevant to the legal issues in the petition, is greatly emphasized in the opposition in the hope that the Court will believe that no harm has befallen the GM salaried retirees because of the changes made. Without any citation to the record, respondent asserts that its plan is "generous." It also states that petitioners make only "modest" contributions (Opp. 4-5). However, the initial changes have been eclipsed by much greater subsequent changes, including annual out-of-pocket expenses up to $5,000 (Pet. 4). Respondent does not mention that it has piled on unprecedented monthly "premiums" (A. 216a), and changes in Medicare coordination rules which have significantly

A. Respondent Has Misrepresented the Record Regarding "Underlying Plan Documents."

Because every facet of the Sixth Circuit's decision is premised on the holding that respondent unambiguously reserved the right to change its salaried health care plan in underlying plan documents, petitioners pointed out that neither the district court nor the court of appeals referred to any reservation of rights language in the pre-1985 insurance documents (Pet. 6).

Respondent asserts not only that reservations of rights to amend were included in insurance certificates, policies, and riders (Opp. 2, 3), but that these materials were distributed to "all covered employees" (Opp. 3), fostering the impression that all salaried employees of General Motors regularly received insurance certificates containing a reservation of rights.

These assertions are false. First, the certificates referred to by respondent are certificates from the Metropolitan Life Insurance Company. Metropolitan coverage was limited geographically (*e.g.*, Tr. Ex. 518 at 2543, R 433, six states), so clearly the certificates were not distributed to all salaried employees.[5] The Metropolitan Group policy (Tr. Ex. 509, R 433, 435) and the various Metropolitan certificates of insurance (*e.g.*, Tr. Exs. 514-516, 518, 519, R 433, 435) with one exception stated that coverage would continue through the life of the surviving spouse at no cost. No reservation of rights language appeared in these certificates. Rather, the reservation of rights language that respondent refers to appears in pre-

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increased the burden on salaried retirees (Tr. Ex. 35 at 12-15, R. 433). And, of course, the objective of GM's defense of the lawsuit has been to win the right to eliminate health care coverage altogether (A. 53a) (Martin, C.J.).

[5] The larger carrier was Blue Cross/Blue Shield. In the summary judgment proceedings in *Sprague I*, respondent produced only one Blue Cross/Blue Shield certificate out of dozens of local Blue Cross plans, and that certificate had no reservation of rights language in it (Tr. Ex. 531, R. 433, 435). Later, a smattering of other certificates was produced.

ERISA *summaries*, not in the Metropolitan certificates themselves. The appearance of a reservation in a pre-ERISA summary is a far different matter, factually and legally, from a reservation in an underlying plan document. The Sixth Circuit panel correctly recognized that pre-ERISA summaries "do not have the same effect as official summary plan descriptions" (A. 74a), and the full Sixth Circuit did not express disagreement with that proposition.

Respondent suggests that SPDs containing lifetime promises but no reservations are ineffective because they cross-reference the insurance certificates as governing (Opp. 3). Neither the district court nor the court of appeals embraced respondent's cross-reference argument.[6]

Respondent points to the standard general termination clause in the Metropolitan Group Policy (Opp. 2). Respondent argued this point below and neither the district court nor the court of appeals accepted it.[7]

Respondent also misrepresents the record with regard to the 1985 "draft" plan. Respondent asserts that the document "explained" that it applied to salaried employees, when in fact the document throughout dealt with "hourly" employees and referred to "salaried employees" only once—on the slip-sheeted cover page marked "draft" (*id.*).[8]

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[6] Giving effect to such cross-references would "wholly undermine the rule that statements of the summary plan description are binding." *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991).

[7] Moreover, the Sixth Circuit in *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 249 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 690 (1997), rejected reliance on such clauses, stating they "were included merely to reserve the right of the employer or the carrier to end their commercial relationship." The Sixth Circuit did not disavow that reasoning in the *en banc* decision below.

[8] Not only did respondent neither distribute nor acknowledge the existence of the 1985 "draft" (Pet. 6), GM counsel in this case did not identify the draft as being among the plan documents in response to a formal ERISA request made prior to the lawsuit (R. 69, Exs. 23, 28). The filing of the document in an unidentified Internal

B. Respondent Has Misrepresented the Record Regarding the Early Retirement Agreements.

Respondent deliberately distorts the detailed, unappealed findings of the district court in *Sprague II*. Those findings speak for themselves, but several corrections to respondent's misstatements are in order.

First, respondent no fewer than 19 times in its brief refers to the early retirement contracts as "informal" communications, when it was established at trial that the early retirement agreements and benefit explanations all constituted authorized communications of GM (A. 214a, 215a). The early retirement agreements were authorized as part of corporate downsizing programs that were directed and approved at the highest levels of the corporation (A. 128a-136a).

Second, respondent implies that some of the contracts were oral, and argues that petitioners advocated an oral modification of the GM salaried health care plan (Opp. 24-25). Respondents purposely confuse the legitimate admissibility of written and oral extrinsic evidence to construe the meaning of ERISA contracts, as occurred in this case (A. 196a-199a), with the question of whether written plan documents can be modified orally, a question that is not presented here at all.

In a most misleading elision of the Sixth Circuit opinion, respondent asserts (Opp. 25 n.13) that the early retirement agreements had nothing to do with health care, but referred only to pension benefits. This was one of the most hotly contested issues at trial. It was determined on extensive unappealed findings that the early retirement agreements did include health care (A. 202a-203a).

In another attempt by respondent to cheapen the early retirement agreements as "informal," respondent asserts that they were "highly abbreviated statements" of "a few sentences or phrases" (Opp. 26). Similarly, respondent

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Revenue proceeding (Opp. 29 n.14) has no relevance here. ERISA plan documents are filed with the Department of Labor. 29 U.S.C. § 1022, 1024.

attempts to recast entirely the contents of the benefit explanations provided to early retirees by stating that they were "extraordinarily diverse," and by incompletely and disparagingly characterizing their contents (Opp. 13). These characterizations stand in contrast to the uncontested findings in *Sprague II* that virtually all of the benefit explanations spoke both to the "lifetime" and "no cost" aspects (*see* Pet. 8).

The early retirement agreements and benefit explanations varied in length. Some were brief, but others ranged up to dozens of pages (Pet. 4). The purpose of the trial was to determine the meaning of the benefit explanations, and that determination was made in favor of the early retirees. Respondent selectively refers to trial evidence in its favor, including the rare occasion on which a plant closing document contained a reservation of rights statement (Opp. 6). Notwithstanding respondent's "incivil" one-sided recitation,[9] the evidence at trial was overwhelmingly in the early retirees' favor.

C. Respondent Has Misrepresented the Course of the Proceedings Below.

The general plan issues in *Sprague I* were decided on a summary judgment record. Appellate review in the Sixth Circuit of those issues necessarily was confined to the summary judgment record. *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1035-36 (D.C. Cir. 1988). By contrast, the bilateral contract claims of the early retirees were tried to the district court, and appellate review of the *Sprague II* and *Sprague III* decisions was based on the trial record.

Respondent misleads the Court in two respects. First, respondent deceptively jumbles the citations to the trial record and the summary judgment record. Second, respondent states that the court of appeals engaged in simple "fact finding" (*e.g.*, Opp. 16 n.4) and determined the early retirement agreement issues "as a matter of fact"

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[9] *See* Interview, *supra*, at 25 (briefs that treat the facts "in a completely one-sided fashion" are "analogous to incivility").

(Supp. Opp. 2, 3). Although the court of appeals reviewed the issues in *Sprague I de novo*, it did not review alleged factual errors in the district court's extensive unappealed findings in *Sprague II* or *III*. Therefore, the court's determinations as to the early retirement agreements must be viewed strictly as a matter of law.

Respondent irresponsibly argues that petitioners waived the threshold claim of the lawsuit that respondent had no underlying plan or plan amendment procedures in compliance with ERISA's "written instrument" requirements (Opp. 29 n.14). No waiver occurred. The parties entered into a post-trial stipulation to reflect their agreement that the case was final for review, which merely recited that the district court already had disposed of the claim in *Sprague I* (R. 360; *see* A. 89a).[10]

II. THE CIRCUITS ARE IN CONFLICT ON THE ISSUE OF VESTING UNDER ERISA SUMMARY PLAN DESCRIPTIONS.

Respondent attempts to sidestep the deep split in the circuits on the issue of vesting under ERISA SPDs by two arguments: (1) all ERISA cases involving collectively bargained ERISA benefits are irrelevant; and (2) all ERISA cases addressing plan ambiguities are irrelevant because the Sixth Circuit here declared the underlying plan to be unambiguous in respondent's favor. Significantly, respondent's argument necessarily concedes that there is a conflict in the circuits, if the premises of respondent's argument are wrong. Respondent's argument is incorrect in both respects.

First, respondent has not cited any provision in ERISA or to a single case holding that the standards for vesting of ERISA welfare benefits are different for collectively bargained benefits than they are for salaried or non-union

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[10] The threshold plan issues were briefed extensively on appeal (P. CA Br. 12-14, 28-32, 35-37; P. CA 2d Br. 41-42), and no assertion of waiver was made. The panel decision and the *en banc* dissent both addressed the threshold plan issues (A. 78a; A. 40a-41a).

benefits. The bare recital in some opinions that the courts were dealing with collectively bargained benefits (Opp. 18-19) adds nothing to the mix. Indeed, the Sixth Circuit itself has held that the standard for ERISA welfare benefit vesting is the same for collectively bargained as well as non-collectively bargained benefits. *See In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1988), (in construing a non-bargained welfare plan, "courts may draw inferences or make presumptions as this court has done in construing collective bargaining agreements providing welfare benefit plans").

Second, the conflict in the circuits does not evaporate by respondent's endless repetition of the Sixth Circuit's conclusion that the plan was unambiguous in GM's favor. The matter before the Court is precisely whether the GM plan is unambiguous (and in whose favor), or ambiguous. Those questions are questions of law. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 671 (6th Cir. 1985). Plan language "is ambiguous if it is subject to two reasonable interpretations." *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368, 1376 (6th Cir. 1994).

Here, each of the SPDs contained statements such as "Your basic health care coverages will be provided at GM's expense for your lifetime" (Pet. 5). The determination of whether or not that language vests benefits, either in the presence or the absence of reservation language, is a legal matter. *See Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 306 (7th Cir. 1996) (under ordinary rules of contract construction, "entitled for the lifetime of the pensioner . . . to the . . . benefit coverages . . . of the Insurance Agreement" "must mean what it says: the retired employees *shall* be entitled to welfare benefits for their lifetime"); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986) ("during the life of the pensioner at no cost to the pensioner" "clearly means that a pensioner will receive health benefits for the remainder of his life"). It is because of the disagreement among the courts of appeals

on how to interpret vesting language that the petition should be granted (*see* Pet. 12-16).

In similar vein, the conflict in the circuits concerning the application of the principle in *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988) (Pet. 13), is not resolved by the conclusion that an explicit promise of lifetime benefits with *no* reservation in an SPD constitutes "silence" on the vesting question (A. 21a). In *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995), cited by the court below, vesting was determined under *ambiguous* plan documents but not under the SPDs. The promissory language in the GM SPDs would have been sufficient to confer vesting and would not have constituted "silence" under that decision.[11]

III. THE PETITION SHOULD BE GRANTED TO REVIEW THE ENFORCEABILITY OF BILATERAL CONTRACTS FOR HEALTH CARE UNDER ERISA.

Most of respondent's opposition with regard to the early retirement agreement issue dissolves upon an appreciation of its factual misstatements (*see* Section I, *supra*). What remains is the important question of whether bilateral agreements are enforceable under ERISA as a matter of law.

The Sixth Circuit held that such agreements are enforceable only if they contain all, or virtually all, of ERISA's "written instrument" requirements (A. 25a) ("documents that do not satisfy ERISA's requirements for plan documents do not qualify as ERISA plan documents").

While respondent concedes that *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), states the test for determining if an arrangement is an ERISA plan, it attempts to limit the application of *Dillingham* to instances where

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[11] Inasmuch as the Sixth Circuit referred to Department of Labor regulations on summary plan descriptions as a reason for virtually abandoning the *Edwards* principle (A. 22a; *see* A. 30a), we respectfully suggest that the Court would be assisted by inviting the views of the United States. The Department of Labor participated below (*see* Pet. 18 n.4).

there is also not a more general plan (Opp. 27). No case announces this narrow restriction of the *Dillingham* principle.

Respondent relies on the statement in *Frahm v. Equitable Life Assurance Soc.*, 137 F.3d 955, 958 (7th Cir. 1998), that the Sixth Circuit here "did not deny" that "bilateral contracts about welfare benefits are possible" (Opp. 24). In *Frahm*, the court believed that, as a logical extension of the federal common law, bilateral contracts must be in writing to be enforced (as were all 50,000 early retirement agreements here). 137 F.3d at 958. But there is a great deal of difference between saying that ERISA contracts must be in writing and rejecting written contracts, as the Sixth Circuit did, because the employer chose not to comply with ERISA's written instrument requirements. Thus, the issue remains whether bilateral contracts for ERISA benefits are enforceable, in the words of the district court, "apart from [the] regular plan" (A. 237a). No other court, including the Seventh Circuit, would strip the protections of ERISA from benefit contracts that do not comply with all of ERISA's written instrument requirements.[12]

CONCLUSION

Petitioners respectfully pray that the petition be granted.

Respectfully submitted,

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Dated: May 1998

[12] The petition should also be granted with respect to the class action issue. Contrary to respondent's argument, the practical importance of the class action ruling below is magnified because of the importance of the other issues presented in the petition.

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No. 97-1639

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT D. SPRAGUE, ET AL., PETITIONERS

v.

GENERAL MOTORS CORPORATION, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Pursuant to Supreme Court Rule 15.8, which permits a respondent to address amicus briefs filed contemporaneously with its brief in opposition, General Motors Corporation submits this response to the amicus filings of the American Association of Retired Persons ("AARP") and Donald Armbruster.

1. AARP contends (at 4) that the Sixth Circuit's en banc decision "upsets the status quo" by "invalidating the business practice of offering ERISA-covered benefits as consideration for an employee's release of potential legal claims." Beyond question, however, agreements to provide retirement benefits in exchange for the release of claims remain enforceable in the Sixth Circuit, as elsewhere. As the Seventh Circuit recognized in *Frahm*, the en banc court "did not deny" the enforceability of bilateral contracts specifying retirement benefits. 137 F.3d at 958. To the contrary, it acknowledged that an employer may vest a particular level of benefits "'by agreement or by private design.'" Pet. App. 18a. The court simply found, as a factual matter, that GM did not promise that deductibles and copayments would never change.

There is no inconsistency between the Sixth Circuit's ruling and *White* v. *General Motors Corp.*, 908 F.2d 669 (10th Cir. 1990), or *Seward* v. *General Motors Corp.*, 805 F. Supp. 623 (N.D. Ill. 1992). AARP Br. 7. In those cases, courts enforced written retirement agreements that released potential claims against the employer in exchange for specified consideration. That is hardly at odds with the Sixth Circuit's ruling that plaintiffs' self-serving interpretations of informal communications do not override the explicit terms of GM's formal ERISA plan. The early retirement agreements here did not even mention health care benefits. Pet. App. 6a-7a. Instead, plaintiffs relied on informal communications that the court of appeals found merely described existing benefits, without either "stat[ing] or impl[ying] that [those] benefits were vested." Pet. App. 22a-23a.

AARP's argument (at 7-11) that early retirees need a good health care plan is another red herring, for there is no dispute that the GM health plan is a generous one. Since 1988, when the changes at issue occurred, GM has voluntarily raised retirement benefits and significantly enhanced medical and dental coverages. Pet. App. 128a n.6. Despite the copayments and deductibles, GM

employees have continued to apply for early retirement at a record pace. C.A. App. 808.

GM's adoption of modest copayments and deductibles—which can be avoided by choosing HMO coverage (Pet. App. 230a n.4)—merely brought GM's plan into line with the vast majority of company-sponsored plans nationwide. GM Opp. 11 n.2. Use of copayments and deductibles in place of "first dollar" coverage has been an important restraint on skyrocketing health care costs. Responsibility for such payments effectively counters the "incentive to overconsume" created when a third party pays all medical costs. Congressional Budget Office, *Economic Implications of Rising Health Care Costs* 18 (Oct. 1992). As a result, virtually all modern health plans, including those offered by the federal government, are built on the premise that "cost sharing should be part of any program of health care financing." Havighurst, *Prospective Self-Denial: Can Consumers Contract Today to Accept Health Care Rationing Tomorrow?*, 140 U. Pa. L. Rev. 1755, 1772-1773 (1992).

Interest groups such as AARP vigorously advocated passage of new legislation that would make employers provide, at their own expense, guaranteed health care benefits. See S. 1757, 103d Cong., 1st Sess. (1993); H.R. 1691 and H.R. 3600, 103d Cong., 1st Sess. (1993). Congress rejected that legislation, leaving intact the employer's right under ERISA to change health care benefits at any time and for any reason. *Curtiss-Wright*, 514 U.S. at 78. This Court should not accept AARP's invitation to impose the very obligations that Congress refused to mandate by creating fictitious bilateral "contracts." AARP's demand for free retiree health care that can never be changed in any respect should be addressed to Congress, not to this Court.

2. Like plaintiffs and the AARP, the Armbruster amici attack strawman rulings the en banc court never made. Amici say they are concerned that the Sixth Circuit's decision permits employers who have made "benefits promises that induce reasonable reliance" to evade their obligations using "secret disclaimers and misleading drafting." Armbruster Br. 2, 5, 11. But the court of appeals determined, as a matter of fact, that GM did not promise that retiree health benefit levels would remain forever unchanged. Pet. App. 20a-24a, 27a. It held that plaintiffs' reliance on GM's

descriptions of current benefits as somehow creating a guarantee of unchangeable future benefits "was not, and could not be, reasonable or justifiable." Pet. App. 27a. And it found that there was nothing "secret" or "misleading" about GM's frequently-repeated reservation of its right to amend the plan. Those reservations were "clearly" and "unambiguously" set forth in the plan and most summary booklets and broadly disseminated to participants. Pet. App. 27a; GM Opp. 2-3. Furthermore, employees knew that GM had frequently exercised its right to amend the medical plan over the years, requiring participants to share the cost of many coverages. See GM Opp. 4.

The Armbruster amici burden this Court (at 6-10) with a long description of pre-ERISA cases decided under the common law of contract, promissory estoppel, and fiduciary duty. Those cases are irrelevant. They involved situations in which plan terms had been modified by agreement or promises of benefits were made and reasonably relied upon. Here, the court of appeals recognized that ERISA plaintiffs may have viable causes of action for breach of contract, promissory or equitable estoppel, and breach of fiduciary duty. It found, however, as a matter of fact, that the parties entered into no contracts modifying the terms of the medical plan, that GM made no promises of free and unchangeable health benefits, that plaintiffs could not reasonably have relied on GM's statements as creating a right to immutable health care benefits, and that GM breached no fiduciary duty. Pet. App. 23a-31a. The Sixth Circuit's fact-bound decision does not provide "less protection" than the pre-ERISA cases. *No* court, before or after passage of ERISA, would have fabricated a promise of unchanging benefits on the basis of the factual record presented here.

The Armbruster brief's invocation of ERISA policy is also misplaced. Although Congress mandated that *pension* benefits vest according to a statutory schedule, it recognized that employers would be deterred from establishing and maintaining *medical* plans if it imposed vesting requirements on such plans. See GM Opp. 29; *Moore*, 856 F.2d at 492; *Adams*, 905 F.2d at 947 ("Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans"). Congress therefore determined that employers should be "free under ERISA, for any reason at any

time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright*, 514 U.S. at 78. Congress's goal of encouraging the broader use of medical and other welfare plans would be thwarted if, despite the employer's unambiguous reservations of its right to amend, welfare benefits could be vested—in contravention of the employer's intention—by descriptive language like that involved in this case. As commentators have observed, employers have available an easy way to avoid that sort of unexpected, ad hoc imposition of fixed benefit obligations: they "can anticipate and avoid the problem simply by not providing health and life insurance benefits to retirees." Barnes & Mishkind, *Retiree Health and Welfare Benefits*, 10 Empl. Rel. L. J. 584, 608 (1985). The court of appeals properly held that imposing liability on the facts here "would create disincentives for employers to offer benefits in the first place," which harms "the interests of employees generally" and "is certainly not compatible with the goals of ERISA." Pet. App. 25a.

In short, the key error in both amicus briefs is that they simply *assume* that GM promised early retirees free and unchangeable health care benefits. The voluminous record here established that no such promise was ever made: GM's statements were not promises or contractual undertakings, but simply described "the terms of the current plan" (Pet. App. 20a); the SPDs' context confirmed that they stated that medical benefits (unlike life insurance benefits) would continue after retirement, not that retirees were entitled to frozen benefit levels (see GM Opp. 16 & n.4); GM reserved its right to amend the plan in innumerable documents distributed to employees, and employees knew from firsthand experience that the plan was an evolving one that frequently changed (see GM Opp. 4); and GM's statements *did not even mention copayments or deductibles*, which all employees knew were required for many coverage options and which were subject to periodic change. Pet. App. 4a-5a, 7a; GM Opp. 4. This case is clearly the wrong vehicle to deal with the legal consequences of employer promises to freeze copayments and deductibles.

For nine years, GM's health care plan has been burdened and disrupted by this lawsuit. The district court's injunction cost the company in excess of $10 million annually. It balkanized the plan,

creating special and discriminatory benefits for one subgroup of retirees while imposing numerous administrative inefficiencies and costs on the plan. See GM's Opposition to Application to Extend Stay, A-559, Decl. of Preston Crabill ¶¶ 3-7 (Feb. 3, 1998). Until this litigation is over, disruption and legal uncertainty will continue to burden the plan to the detriment of the employer and plan beneficiaries. Amici have not come close to showing that the Sixth Circuit's case-specific decision conflicts with any ruling of this Court or of another circuit. The Court should deny the petition promptly, allowing GM to administer the plan in the manner Congress intended.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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